IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 206.

FRANCES REBECCA HAMILTON, PLAINTIFF IN ERROR,

vs.

GRACE ABBIE B. RATHBONE.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

On June 13, 1891, the defendant in error brought an action of ejectment in the supreme court of the District of Columbia against the plaintiff in error to recover an undivided third interest of a parcel of land in the District of Columbia, of which the plaintiff in error was then in possession. A plea of not guilty having been interposed, and issue being joined, the case was tried before Mr. Justice Bradley and a jury in January, 1893. When the evidence was closed the presiding justice directed the jury to render a verdict for the defendant. But on appeal to the Court of Appeals from the judgment entered upon the verdict so rendered, the

Court of Appeals set aside the verdict and remanded the case for a new trial. The second trial was had before Mr. Justice McComas and a jury, and at the close of the evidence he instructed the jury to render a verdict for the plaintiff. From the second judgment the defendant appealed to the Court of Appeals, and that court affirmed the judgment appealed from; whereupon the defendant brought the case here by writ of error.

By a deed dated July 31, 1867, one Thomas J. Quinter and his wife conveyed the land in question to Abram Elkin, who was the husband of Lucy V. Elkin (Record, p. 17). On the 29th of April, 1872, Abram Elkin and his wife conveyed this tract to her brother, Frederick G. Calvert (13, 14), and on the same day Calvert and his wife conveyed it to Lucy V. Elkin (12). The title remained in Mrs. Elkin until her death, which occurred on May 3, 1876 (15). She left a will by which she appointed Calvert her sole executor. She directed that all her property, real and personal, should be sold, and gave her husband, Abram Elkin, $1,000 out of the proceeds of the sale, directing that the residue of the proceeds of sale, after the payment of funeral and other necessary expenses, should be divided equally between her four children (17). Calvert duly qualified as executor (11). In February, 1879, he sold the land in controversy to the plaintiff in error, and on the 20th of that month he, as executor, made and delivered to the purchaser a deed, which recited the will and the sale under the powers thereby conferred, and by which he conveyed the land to the plaintiff in error (8, 9). Of the four children of Mrs. Elkin who survived her, one died in 1885, when under ten years of age. The other three were living at the time this action was begun (15) and the eldest of the three is the plaintiff.

To sustain her action the plaintiff claimed that Mrs. Elkin held this real estate as her general property, not as her separate estate, and that, being a married woman, she could not devise it. It was because these questions were decided against

her by the presiding justice at the first trial that a verdict was then directed for the defendant. On the appeal that followed, the Court of Appeals sustained the plaintiff's contention. The opinion of the court was delivered by Mr. Chief Justice Alvey, and a copy of it is appended to this brief. It will be found also in the report of the case in 4 App. Cas. D. C., 475. The case was made to turn upon the construction of section 728 of the Revised Statutes of the District of Columbia. The original statute from which that section is derived was an act of Congress, approved April 10, 1869, entitled "An act regulating the rights of property of married women in the District of Columbia" (16 Stat., 45), of which the following is a copy:

"That in the District of Columbia the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were *femme sole*, and shall not be subject to the disposal of her husband, nor be liable for his debts; but such married woman may convey, devise, and bequeath *the same*, or any interest therein, in the same manner and with like effect as if she were unmarried.

SEC. 2. *And be it further enacted*, That any married woman may contract, and sue and be sued in her own name, in all matters having relation to her sole and separate property in the same manner as if she were unmarried; but neither her husband nor his property shall be bound by any such contract nor liable for any recovery against her in any such suit, but judgment may be enforced by execution against her sole and separate estate in the same manner as if she were sole."

In the revision of the District laws in 1874 this act became sections 727 to 730, as follows:

"SEC. 727. In the District the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were unmarried, and shall not be sub-

ject to the disposal of her husband, nor be liable for his debts.

"SEC. 728. Any married woman may convey, devise and bequeath *her property*, or any interest therein, in the same manner and with like effect as if she were unmarried.

"SEC. 729. Any married woman may contract, and sue and be sued in her own name, in all matters having relation to her sole and separate property, in the same manner as if she were unmarried.

"SEC. 730. Neither the husband nor his property shall be bound by any such contract, made by a married woman, nor liable for any recovery against her in any such suit, but judgment may be enforced by execution against her sole and separate estate in the same manner as if she were unmarried."

It will be seen that while the original act gives a married woman the right to devise property acquired during marriage in any way other than by gift or conveyance from her husband, section 728 of the Revised Statutes gives her the right to devise "her property" generally.

At the second trial the defendant submitted to the jury evidence which it was claimed tended to show that the conveyance of the property in dispute to her was for a valuable consideration. If she could have established this fact it would have entitled her to a verdict in her favor, as this court has held that the exception in the married women's act in the District as to "gift or conveyance from her husband" does not apply where there is a valuable consideration for the deed from the husband to the wife. (Sykes *vs.* Chadwick, 18 Wall., 141, 148.)

The Court of Appeals in remanding the case for a second trial intimated that there was a difficulty in the plaintiff's case growing out of the fact that upon the death of Mrs. Elkin her husband became entitled to possession as tenant by the curtesy, and that "to maintain the action the death of the father must be shown, either by positive proof or presumption." Accordingly, at the second trial there was evidence

which the plaintiff claimed entitled her to the benefit of the presumption of death after absence for seven years.

When the defendant purchased from Calvert the land in dispute the plaintiff was a little less than fifteen years old (8, 15). When she began this suit in June, 1891, she was over twenty-seven years of age. It was claimed on behalf of the defendant that the evidence at the trial justified the defendant in asking the court to leave to the jury the question whether the plaintiff, by her acts of omission and commission after she reached the age of twenty-one, had not precluded herself from assailing the defendant's title under the purchase from Calvert.

When the evidence was closed, however, the court instructed the jury to render a verdict for the plaintiff. To this ruling the defendant duly excepted, and her bill of exceptions was duly signed and filed (28, 29). On the second appeal the Court of Appeals affirmed the judgment below. The opinion of the court is in the record (29–34).

When the defendant purchased the property in 1879 she paid $1,500 for it (8). After that time, and before this suit was brought, she spent about $8,000 in improvements on the land (24).

As usual in ejectment cases, the record in the trial court did not fully disclose the value of the land in controversy. In each of the several deeds the tract is described, and is shown to contain one acre of land, and to front about one hundred feet ($6\frac{1}{10}$ perches) on "Fourteenth Street road." When application was made to the Court of Appeals to allow the writ of error from this court, there was filed in support of the application the affidavit of William Holmead, who stated that he resides in the vicinity of the land; that he knows its value; that that part fronting on Fourteenth street to a depth of one hundred and fifty feet was worth one dollar per square foot, and that the remainder was worth forty cents per square foot (35). This would make the value of the land (without reference to the improvements) over

twenty-six thousand dollars. The plaintiff claimed to recover a one-third interest in this tract. Another suit in ejectment was brought by the plaintiff and her only surviving brother to recover the other two-thirds interest in this land, and by stipulation that suit abides the result of this.

ASSIGNMENTS OF ERROR.

The court below erred:

1. In holding that the will of Lucy V. Elkin was void as to the real-estate in controversy.

2. In holding that the evidence was insufficient to entitle the defendant to go to the jury on the question whether the conveyance of the land in controversy by Abram Elkin to the defendant, through Calvert, in April, 1872, was made for a valuable consideration.

3. In holding that there was not sufficient evidence in the case to entitle the defendant to go to the jury upon the question whether the plaintiff was not precluded from assailing the conveyance from Calvert under which the defendant claimed title.

4. In holding that upon the evidence the jury were bound to find as a fact that Abram Elkin was dead on the 13th of June, 1891, when this action was brought.

5. In not sustaining the defendant's exception to the instruction granted at the trial directing the jury to find a verdict for the plaintiff.

6. In affirming the judgment of the supreme court of the District of Columbia in favor of the plaintiff.

ARGUMENT.

I.

THE WILL OF MRS. ELKIN WAS VALID AS TO THE REAL ESTATE IN CONTROVERSY.

1. *The testatrix held this land, not as a part of her general property, but as her equitable separate estate, and therefore could devise it without reference to the married women's act of* 1869 *or any other statute.*

The long-established rule of courts of equity, that where a married woman holds real property as her separate estate she may devise or otherwise dispose of it as if she were a *femme sole*, has always been in force in the District of Columbia (Sexton *vs.* Wheaton, 8 Wheat., 229; Prout *vs.* Roby, 15 Wall., 471). It was formerly held in England that the intervention of a trustee holding the legal title was necessary to support such a separate estate in a married woman. But the law has been otherwise for a hundred years, and the modern doctrine that where the legal title to real estate is transferred to a married woman for her separate use the husband, in whom the legal title vests by law, will be decreed to hold it in trust for his wife, is the settled law of this country. (Jones *vs.* Clifton, 101 U. S., 225.)

The habendum clause of the deed from Calvert to Mrs. Elkin is as follows:

"To have and to hold the said piece or parcel of land and premises, with the appurtenances, unto the said party of the second part, her heirs and assigns, *to and for her and their sole use, benefit and behoof forever.*"

The English and American cases upon the question of what words will import a separate estate in a deed or other

instrument vesting a legal or equitable title to real estate in a married woman are collected in Schouler on Husband and Wife, sec. 225; Schouler on Domestic Relations, sec. 105, n. 4, and in 3d Pom. Eq. Jur., sec. 1102, n. 1. Schouler observes, in his work on Domestic Relations, that the words "sole use" seem to be enough for this purpose. Pomeroy states that the American courts on this subject are more liberal in favor of the wife than the English courts.

As to the English cases, it was held by Sir William Grant, master of the rolls, in Adamson *vs.* Armitage, 19 Ves. Jr., 416, that the bequest of the income of a certain fund to a married woman "to be for her sole use and benefit" gave her a separate estate. On this subject he said:

"There was some dispute at the bar whether this was for her sole and separate use, as there would then have been a reason for this direction, though the property was in her. I think the direction, that it shall be for her sole use, sufficient to vest the property in her exclusive of the marital right. In a case mentioned in *Lumb vs. Milnes*, Lord Alvanley had held that a bequest to a woman for her own use and benefit was sufficient, showing that it was not for her husband's use, and if for her sole use it is just as strong to show that it cannot be for her husband's.

"Upon the whole, I think the plaintiff entitled to the absolute interest in this fund."

In a bequest to trustees, the phrase "in trust for her sole benefit during her lifetime" was held to vest in the beneficiary—a married woman—a separate estate. (Green *vs.* Britten, 1 De G., J. & S., 649.)

In Gilbert *vs.* Lewis, 1 De G., J. & S., 38, a testator had devised and bequeathed all his real and personal estate to the plaintiff—a married woman—"for her sole use and benefit." The suit involved real estate, and the Lord Chancellor (Lord Westbury) held that this language gave the wife no separate estate, but he decided the case on another ground.

In Lindsell *vs.* Thacker, 12 Sim., 178–184, the question was whether a general devise by a husband to his wife passed his interest in certain real estate to which he held the legal title in trust for other persons, and that was made to depend upon whether the wife took a separate estate. The language of the devise in that case was:

"I hereby give and bequeath all my property whatsoever * * * unto my loving wife for her sole use forever."

It was held that this language gave the wife a separate estate, and that therefore the interest in real estate which the husband held simply in trust did not pass. Vice-Chancellor Shadwell, in deciding the case, said:

"The words 'sole use' necessarily imply separate use, and indicate that the testator meant that the property which he had devised to his wife should be enjoyed by her beneficially."

In Inglefield *vs.* Coglan, 2 Coll. & C. C., 247, it was held that a bequest to a married woman "solely and entirely for her own use and benefit during her life" gave her a separate estate during her life.

In Bland *vs.* Dawes, L. R., 17 Ch. D., 794–797, Vice-Chancellor Malins was required to construe, in a legacy to a married woman, the words "for her sole use and disposal." He said:

"I have a strong impression that wherever property is given to the 'sole use' of a woman, the intention is to give it to the separate use, because the word 'sole' must mean one person. * * * However, the authorities are adverse to that view."

He then holds (following Pritchard *vs.* Ames, T. & R., 222) that the addition of the words "and disposal" sufficiently indicated that a separate estate was intended.

In Lewis *vs.* Matthews, L. R., 2 Eq., 177, the question at issue and the manner in which it was decided sufficiently

appear from the following quotation from the opinion of Vice-Chancellor Kindersley:

"What, then, is the effect of the devise being to Hannah Walker, her heirs, executors, administrators, and assigns forever, 'for her and their own sole and absolute use forever'? Does the word '*sole*' import that the devise is to her '*separate*' use?

"There seems to have been different opinions on the point. In Lindsell *vs.* Thacker the Vice-Chancellor of England held that a devise to testator's wife for her sole use forever necessarily implied separate use. In Gilbert *vs.* Lewis, Lord Westbury held that a devise to a testator's wife for her sole use and benefit did not give her an estate to her separate use. In Green *vs.* Britten the lords justices were of opinion that a bequest of personalty to a married woman, with a direction that it should be invested as the executors should think proper in trust, for her sole benefit, during her lifetime, was a gift to her separate use. The point, however, appears not to have been contested.

"But in the present case the word 'sole' is not confined to the lady herself, but is applied equally to her heirs, executors, administrators, and assigns, to whom it could not have been intended to give a separate estate, and that appears to me conclusively to show that the testator did not mean by the use of that word to give to Hannah Walker the property for her separate use, but only to give her the absolute interest, and that it is used very much in the same sense as the word 'absolute.'"

But in a case entitled "*In re* Tarsey's Trust," L. R., 1 Eq. Cas., 561, Vice-Chancellor Page held that a separate estate was created by the words "for her own sole use and benefit absolutely," and this notwithstanding in a preceding clause of the instrument relating to another gift the words "sole and separate use, free from the control of any husband," were used. The Vice-Chancellor refers to Lord Westbury's opinion in Gilbert *vs.* Lewis, as "extrajudicial."

In two English cases which are found cited as against the proposition that the words "to her sole use" will create a separate use, it will be found that the opinion of the court

was based entirely upon the fact that in other clauses of the same will relating to other bequests or devises the scrivener had used the words "to her sole and separate use." (Kensington *vs.* Dolland, 2 Mylne & Keen, 184; Roberts *vs.* Spicer, 5 Madd. Ch., 298.)

Finally came the case of Massy *vs.* Rowen, L. R., 4 Eng. & Ir. App., 288–297, in which the House of Lords was called upon to construe a will in which the testator had devised real estate to certain persons in trust "*for the sole use*" of his daughter and her assigns. It appeared that at the time of the making of the will the daughter was single, and that at that time the testator had another daughter, who was married, for whom he likewise made provision, and in reference to her used the words "sole and separate use." The principal opinion in the case was delivered by Lord Chancellor Hatherly. He advised, the other judges concurring:

1. That the word *sole* is not like *separate*, a technical word necessarily implying in such a connection exclusion of the husband.

2. That if there be nothing else in the instrument to show an intention to give a separate estate, the husband is not excluded.

3. That in the particular case other parts of the will, and especially the provision for the married daughter, showed that in the provision for the unmarried daughter the word *sole* meant the exclusion of the other beneficiaries, not a future husband.

The Lord Chancellor expressly declined to give any weight to the fact that the word "sole" was made to apply to the daughter's *assigns* as well as to herself. He evidently intended to criticise, without mentioning it, the conclusion reached by Vice-Chancellor Kindersley in construing a

similar expression in Lewis *vs.* Matthews, L. R., 2 Eq., 177, *supra*.

The following are believed to be the principal American cases on the question now under consideration.

In Jamison *vs.* Brady, 6 S. & R., 466, the supreme court of Pennsylvania held that a bequest to a married woman "for her own use" created a separate estate.

In Williams *vs.* Holmes, 4 Rich. Eq., 475–479, it was held that the words "in trust for the sole use, benefit, and behoof" were technically expressive of an intention to create a separate estate.

In a deed of chattels to a trustee "for the proper use and benefit" of a married woman it was held in Mississippi that this imported a separate estate in the wife during the joint lives of the husband and wife, but that on her death he became entitled to the property. (Warren *vs.* Haley, 1 Sm. & M., 647.)

In a similar instrument it was held in Tennessee that the words "for the use and benefit of said Elizabeth and children, and to remain in the possession of said Elizabeth for the use and support of said children forever," gave a separate estate. (Hamilton *vs.* Bishop, 8 Yerg., 33.)

The testator devised all his real and personal property to his wife "for her own proper use during her lifetime"—remainder over. In a case which involved the title to personal property only, but in which the court made no distinction between the effect of the will upon real and personal property, it was held that the words "to her own use" would have been enough to create a separate estate, and that the word "proper" gave this meaning emphasis. Said the court: "'To her own use' is equivalent to her own peculiar use, as essentially belonging to her or to her own use strictly." (Snyder *vs.* Snyder, 10 Pa. St., 423.)

A devise of real estate to children and their heirs forever, "to be for their sole use and benefit," was held to give to one of the children, a daughter, a separate estate. In that

case, however, some stress was laid upon the fact that another clause of the will directed the trustees, in whom the legal title to the property was vested, to take receipts from the children. (Jarvis *vs.* Prentiss, 19 Conn., 272–282.)

In the case of Prout *vs.* Roby, 15 Wall., 471, a case which originated in the supreme court of the District of Columbia, this court held that where a lease was made for ninety-nine years to a trustee for the benefit of a married woman, her heirs or assigns, she took a separate estate in the lease. The instrument contained an express power to her to dispose of her interest by will. Mr. Justice Swain, delivering the opinion of the court, said:

"No particular phraseology is necessary to create the provision for *a femme covert*, technically designated in the law as her *separate estate*. As in all other cases of instruments to be construed, the controlling test is the intent of the parties. That, in whatever language it may be clothed, constitutes the contract. Here the meaning is so clear that no room is left for doubt. The intervention of the trustee and the power of disposition by will could have had no purpose but to give to the *cestui que trust* the same power over the lease as if she had been *a femme sole*, and to place it beyond the reach and control of her husband, both during her life and after her death. These facts are irreconcilable with any other view of the subject. No interest in the lease could vest in the husband without some act on her part in his favor. No such act was done. His assumption of control over the premises after her death was simply usurpation, and no right or title passed under his will to his devisee."

It was held in Merrill *vs.* Bullock, 105 Mass., 493, apparently without discussion or controversy, that a grant of real estate to a married woman in her own right, *habendum*, "To the said * * * her heirs and assigns, to her and their use and behoof forever," did not create a separate estate. It will be observed that the word *sole* was omitted in this deed.

In Griffith's Adm'r *vs.* Griffith, 5 B. Monroe, 113–115, it

was held as to a deed of *personal* property to a married woman that the words "for her own proper use and benefit forever" strongly indicate an intention to create a separate estate; but it is said in the opinion in that case, *obiter*, that in a deed of land, such words being usual and importing only an absolute transfer of the title, would not operate to give a separate estate and exclude the husband. The court say that in the case of personal property if there be no separate use the husband takes the full title and the deed would really be a deed to him.

And this court in the case of Lippincott *vs.* Mitchell, 94 U. S., 767, held that in a conveyance of lands in Alabama to a married woman the words "to have and to hold to the sole and proper use, benefit, and behoof of her, her heirs and assigns forever," did not under the laws of that State vest in her an equitable separate estate. While the law of Alabama upon this point was in question, it must be conceded that the opinion, which was delivered by Mr. Justice Swain, proceeds upon the general law. He says in substance that this habendum is the common one in use in England and this country where the intention of the parties is merely to indicate ownership in fee-simple. Mr. Justice Strong dissented.

If the case at bar could not be distinguished from the case of Lippincott *vs.* Mitchell we should hesitate to ask the court to reopen the question there decided; but in this case the conveyance is one which was made for the purpose of transferring the title *from the husband himself* to the wife, and we submit that upon the reason of the matter and upon all the authorities the words "to her sole use" or "to her own use," or even "to her use," simply, must be held in such a conveyance to vest in the wife a separate estate.

When a married man voluntarily transfers to his wife, either directly or through a third person, any property, real or personal, it is but reasonable to conclude, whatever may be the language of the deed, if there be nothing in it

to evidence a contrary intention, that he means to give her the control of it.

As to personal property, in the absence of any statute, if this were not so, the title which he would transfer to his wife the law would immediately transfer back to him; and as to real property, if she do not by the transfer take a separate estate, the husband immediately becomes entitled to the use of the property as fully as before the transfer was made. His interest in it may be reached and sold by his creditors. The grantee can make no disposition of the property without his consent and concurrence. It will, indeed, in case of her death, pass by operation of law to her heirs, subject to his tenancy by the curtesy if there be a child born of the marriage. But if the purpose of the husband be to vest the title in the heirs of his wife, he could do so without making her a conduit. The only case in which the transfer will have any effect at all will be when the wife survives the husband, in which case her right of disposition becomes absolute; but if that were the sole object of the husband, it could be accomplished by devising the property to his wife by his will. The presumption must be that he intends the transfer to have some effect at once, and that intent can only be carried into effect by vesting in her a separate estate.

A similar question is presented when an antenuptial settlement is made in the wife's favor either by her prospective husband or by somebody else.

In all such cases the authorities seem to be uniform that a separate estate is created unless a contrary intent clearly appears.

In *Ex parte* Ray, 1 Madd. Ch., 115, a woman who was about to marry conveyed her entire estate (consisting entirely of personal property) to trustees "for her own sole use, benefit, and disposition." It was held that this gave her a separate estate. The court said:

"The doubt arises, in this case, on the construction of words in a settlement, and they must be explained, if necessary, by the context. All that this lady had she settled; and there appears an intention to exclude her intended husband. Taking the words '*sole use*' by themselves, they must have the same meaning as 'separate use.' Omitting the word *sole*, the property would go to the husband, but I am not at liberty to reject that word. '*Sole*' means solely hers—for her sole benefit. It is an emphatic and operative word.

"I admit that a husband's marital right cannot be taken away but by a clear intention; but here, I think, the intention is clear. The master of the rolls has decided on the effect of these words in the case alluded to, of Adamson *vs.* Armitage, and that they pass a separate estate.

"It is true that in other parts of the will where a separate estate is given other words besides the word '*sole*' are used, but that is only a redundancy of expression.

"The courts have gone a great way in abridging the marital rights of the husband. Money given to the husband '*for the livelihood of the wife*,' and money directed '*to be paid into her proper hands*,' has been held to pass as separate estate.

"This must be considered as the separate estate of *Mrs. May*, and an order made accordingly."

In Steel *vs.* Steel, 1 Ired. Eq., 452–456, it was held that a gift of chattels by a husband to a trustee for the use of the wife necessarily implies a separate estate in the wife, since otherwise the gift would be void, as the title to the property would immediately again vest in the husband. In Good *vs.* Harris, 2 Ired. Eq., 630, a conveyance of personal property by a married man to a trustee for the use, maintenance, and support of his wife and her children was held to create a separate estate.

In a deed from a husband to his wife, after reciting that he was leaving home, and that he wished to provide a permanent abode for his family if he failed to return, and "to provide against confusion at all events," he simply "granted" his entire estate to his wife in fee. It was held to

be the settled doctrine that a conveyance by a husband to his wife, either directly or through a trustee, is presumed to be for her separate use, although words are not used which would be necessary to have that effect in a conveyance from a stranger. (Sayers *vs.* Wall, 26 Gratt., 354–374.)

In Harshberger's Adm'r *vs.* Alger, 31 Gratt., 52–61, it appeared that a husband and wife, having agreed to separate, united in a deed to a trustee of certain real estate "for the express use, support, and maintenance" of the wife. By the agreement between them she renounced any claim on her husband for her maintenance and support. After questioning the validity of such a separation deed, the court held that if valid it created a separate estate, saying: "Otherwise it would be ineffectual for the purposes manifestly contemplated."

So in Leake *vs.* Benson, 29 Gratt., 53, it was held that a conveyance by a husband to his wife for her life, whether directly or through a trustee, is presumed to be for her separate use.

This doctrine was again confirmed by the court of appeals of Virginia in Garland *vs.* Pamplin, 32 Gratt., 305–314.

In a case in Kentucky, precisely similar to Harshberger's Adm'r *vs.* Alger (31 Gratt., 52), that case was followed. In the Kentucky case the words were "in trust for the use and benefit of." Both real and personal property were involved. (Gaines's Adm'x *vs.* Poor, 3 Metcalfe, 503.)

In Deming *vs.* Williams, 26 Conn., 225–230, a case in which personal property only was involved, the court say it is well settled that a gift or conveyance from the husband to the wife is held to be for her separate use without the use of words which would be necessary for that purpose if the gift were from a stranger, and this upon the ground that otherwise the gift would be inoperative.

In Whitten *vs.* Whitten, 3 Cush, 191–199, a husband had given a power of attorney to his wife to demand and receive "to her use" any money, etc., coming to him. In another

part of the instrument the words used were "to her own individual use." This language was held to create a separate estate. With the money which she had collected under the power of attorney the wife had bought lands, and the question arose in an equitable action begun by the husband's heirs, in which they set up a resulting trust in the husband's favor. In the course of the opinion this language is used:

"But cases which turn upon the general doctrine that a gift to the wife is a gift to the husband do not apply to this case, which is a grant by the husband himself to the wife. The doctrine that a gift to the wife is a gift to the husband cannot apply where the husband himself makes a gift or grant to the wife, which surely cannot be taken as a gift or grant to himself. Besides, in all cases where the intention to give a separate property to the wife is manifest, that intention is to be carried into effect, and where the husband himself makes a gift or grant to the wife, the intention to relinquish his own rights in favor of the wife, and thus to give her a separate property or interest, is necessarily and most clearly and unequivocally manifested and declared. The cases, therefore, which have been referred to, to show that expressions such as those used in the power do not create a separate property in the wife, cannot apply to this case, while by these terms, as between the husband and wife, the intention of the husband to give a separate right and interest in the property to the wife is unequivocally declared, and such intention, by all the authorities, is to be carried into effect."

Other cases upon this subject will be found in White and Tudor's Leading Cas. in Eq., p. 733 (4th Am. from 4th London ed.); note to Hulme *vs.* Tennant. It is there said:

"This principle was overlooked in Bowen *vs.* Sibree, 1 Bush, 112, but would seem to be indisputable."

In the leading case referred to above of Massy *vs.* Rowen, L. R., 4 Eng. & Ir. App., 288–297, in discussing the effect of the word "sole" in a conveyance to a married woman, Lord Chancellor Hatherly says that in a marriage settlement such

language does exclude the husband, and that it also excludes him in any case of the devolution of property upon a single woman at a time when she is about to marry, unless something further appears to show a contrary intention; and he adds:

"In all these cases the word 'sole' finds its ready and appropriate meaning in its being a provision to secure the property against the control of the husband, and to give to her the sole and absolute disposal of it."

In the case of Lippincott *vs.* Mitchell in this court (94 U. S., 767) the conveyance in question was not made either directly or indirectly from the husband nor in contemplation of the grantee's marriage. On page 4 of the brief for the appellee in that case the distinction upon which we now rely was noticed and the attention of this court called to the fact that the conveyance in question was from a stranger, not from the husband, in this language:

"This deed is made to her by a stranger, not by one of her kindred who might be supposed to have some solicitude to provide a separate estate for her by the terms of the deed."

We respectfully submit that there is no escape from the conclusion that when Abram Elkin conveyed the real estate in controversy to his wife, through her brother, to and for her sole use, benefit, and behoof, he gave her a separate estate.

It is true that the right of a married woman, when she holds real estate to her separate use, to dispose of it by deed or will, is a right established by courts of equity.

And the Court of Appeals seems to have been of the opinion that although the defendant might be entitled to hold the property against the plaintiff because of certain equitable considerations, yet she could not set up that defense in an action of ejectment. Mr. Chief Justice Alvey says in this connection:

"How a court of equity might consider and deal with the facts of the case is a question that we are not called upon to determine in this action" (32).

Yet this precise question has been determined by this court in three cases. In City of Cincinnati *vs.* Lessee of White, 6 Pet., 431, it was held that an owner of land by acts and conduct which amounted to a dedication thereof to the public precluded himself from recovering possession of the same, even in an action at law. In Dickerson *vs.* Colgrove, 100 U. S., 578, the defendant in ejectment relied solely upon an equitable estoppel, and the question was distinctly presented to the court whether such a defense was available at law or must be set up in equity. It was held that the defense must prevail even in an action at law, the court saying:

"The common law is reason dealing by the light of experience with human affairs. One of its merits is that it has the capacity to reach the ends of justice by the shortest paths.

"The passage of a title by inurement and estoppel is its work without the help of legislation. We think no sound reason can be given why the same thing should not follow in cases of estoppel *in pais* where land is concerned. * * * Whether the title passed or not, the fact that the plaintiff was not entitled to possession of the premises was fatal to the action."

In the case of Kirk *vs.* Hamilton, 102 U. S., 68, Dickerson *vs.* Colgrove was approved and followed. That also was an action of ejectment. It was held that the plaintiff could not recover, because a void sale of the property in controversy had been affirmed by him by disputing the right of certain of his creditors to be paid out of the proceeds of the sale, and by remaining silent while the purchaser expended large sums in improvements upon the property.

2. *The evidence in the case at least justified the submission to the jury of the question whether Mrs. Elkin's husband had not consented to the making of this particular will, or acquiesced in it after her death; and if he did either, the will was valid even as to real estate.*

The will bears date April 22, 1876, four years after the real estate in controversy was conveyed from Elkin through Calvert to Mrs. Elkin, and only eleven days before Mrs. Elkin's death (10, 12, 15). She died May 3, 1876, and Calvert qualified as executor on the 8th day of June, 1876 (11), the will having been admitted to probate in the meantime. A few days after Mrs. Elkin's death, Elkin went to the executor and wanted to borrow money from him, saying that he "was not willing to wait for the thousand dollars." Thereupon Calvert advanced him something over two hundred dollars. This was long before the sale of the property to Mrs. Hamilton, which occurred in February, 1879 (8). At the time of this transaction Elkin told the executor that his wife had given him money towards paying for the property, and that he, Elkin, "wanted to get something to get out of town" (19). It will be seen hereafter that it is admitted on all hands that upon getting this money from the executor Elkin left the city and has never returned.

In this connection it is to be remembered that when this property was conveyed from Elkin, through Calvert, to Elkin's wife Elkin had become insolvent and was being pressed by his creditors, and told Calvert at the time of the transaction that he wanted to make the property over to his wife for two reasons: (1) because she had helped him to pay for it, and (2) so that his creditors could not touch it, or something like that (19). All these things put together very clearly indicate that the arrangement between Elkin and his wife was that she was to give him by her will what he had put into the property, and she was to have the rest for her own uses and purposes; and when this agreement

had been carried into effect by her will he took, in advance of the sale of the property, a part of the proceeds thereof on account of his legacy, thereby ratifying in the most unmistakable manner what his wife had done in making the will. But, however this may be, we think no one will question that there was evidence sufficient to be submitted to the jury tending to show that Elkin had so far waived his marital rights as to consent to the making of this will and acquiesce in carrying it into effect after his wife's death; and, that being so, the will stands, even if the property conveyed in it was the wife's general property and not her separate estate.

"The wife's disability was due to the husband's marital rights; so that when such rights did not exist there was no disability." (1 Jar. on Wills, 39, note 1.)

After the husband has induced the executor under his wife's will to act under it he cannot dispute it. (1 Redfield on Wills, 25.)

As to personal property, the will of a married woman is good at common law if made in pursuance of an agreement before marriage, or of an agreement made after marriage on good consideration, or if the husband assented to the particular will and survived her. (1 Jar. on Wills, 40, and notes.)

The wife may make a valid will of personalty with the consent of her husband, good if he survives her. Though the will of a married woman when presented for probate is a mere nullity, yet if it is alleged to have been made with the consent of the husband the court assumes jurisdiction. The consent must be to the particular will, which consent may be inferred from circumstances. "If, after his wife's death, he [the husband] acts upon the will or once agrees to it, he is not considered at liberty to retract his consent afterwards and oppose the probate." (Schouler on Hus. & Wife, sec. 458.)

This rule is general in the United States. (*Id.*, sec. 459.)

If the husband acts on the wife's will or agrees to it after the death of the wife, he is not at liberty to retract. (1 Jar. on Wills, 39.)

The leading case in this country on this subject is Bradish *vs.* Gibbs, 3 Johnson's Ch., 519. In that case a man prior to his marriage had entered into an agreement with his prospective wife that she should have power during the coverture *to dispose of her real estate by will.* A will of real estate made by her during coverture in favor of her husband was enforced in equity, her heirs being required to convey to the husband the legal estate which had descended to them on her death. Chancellor Kent reviewed the authorities, English and American, and held that in equity the will was valid because of the husband's consent, though otherwise it would have been void, and even with the husband's consent was void at law.

Another case frequently cited and approved on this point is Cutter *vs.* Butler, 25 N. H., 343, 359, 360. That was an action of trover brought by the husband claiming his deceased wife's personal property. The wife had left a will which had been admitted to probate, under which the defendant claimed. It was held that the consent of the husband to the will might be shown by circumstances, as, that, when the inventory was made, he pointed out articles as belonging to her; and it was further held that his consent once given could not be retracted. The court also strongly intimates that the judgment of the probate court admitting the will to probate was conclusive as to the husband's assent, saying:

"If the husband designs to controvert either of these things [his assent to the will or his assent that particular property should pass by it] the time and place appointed for that purpose by the law would seem to be the courts of probate at the time of the allowance of the will and not after nor elsewhere."

In Fisher, ex'r, *vs.* Kimball, 17 Vt., 323–328, it was held (per Redfield, J.), on appeal from a decree of a probate court, that the fact that a husband had given written consent to his wife's making a particular will validated it, even though it would have been invalid without such consent.

In Wagner *vs.* Ellis, 7 Pa. St., 413, it appeared that the husband had consented to the making of the particular will, and it was held on that account good as to both real and personal property. It appeared in that case that the wife left no near relatives, and that the husband was himself her heir.

It has sometimes been said that the consent of the husband cannot make valid a wife's will of real estate when the real estate is a part of her general property. This seems to be upon the theory that for some reason a married woman is incapable of making a will of real estate. We shall show below that this is an error; that coverture of itself has never had the effect of disqualifying a woman from making a will of either real or personal property; that, as to personal property, she could not bequeath it because it was not hers, but her husband's, and that as to real estate the statute of wills in England excluded her. Chancellor Kent's opinion, however, in Bradish *vs.* Gibbs, *supra*, is directly in point, the only property involved in that case being real estate.

But there is another consideration in this case which makes further inquiry into this distincton between the husband's consent to a will of personal property and his consent to a will of real estate unnecessary. Mrs. Elkin's will directs that all her property, real, personal, and mixed, shall be sold, and provides for the distribution of the proceeds of the sale.

"Nothing is better settled than this principle—that money directed to be employed in the purchase of land and land directed to be sold and turned into money are to be considered as that species of property into which they are directed to be converted, and this in whatever manner the direction

is given, whether by will, by way of contract, marriage articles, settlement, or otherwise, and whether money is actually deposited or only covenanted to be paid, and whether the land is actually conveyed or only agreed to be conveyed; the owner of the fund or the contracting parties may make land money or money land. The cases establish this rule universally." (Fletcher *vs.* Ashburner, 1 Brown Ch., 497, per Sir Thomas Sewell, M. R.; quoted as the law on this subject in 1 Pom. Eq. Jur., sec. 161.)

The same doctrine is laid down and the authorities cited in 1 Jar. on Wills, ch. XIX, beginning at marginal page 547.

In Perkins *vs.* Coughlan, 148 Mass., 30, a petition had been filed in the probate court for the construction of a will which directed land to be sold and the proceeds to go to the payment of debts. The court said:

"He [the testator] impressed upon the outlands their character of personalty, and the law will deal with the property as having this character at the time of his death."

Even where by the terms of the will the sale of real estate *may* be deferred by the executors for a term of years, the conversion into personalty is deemed complete immediately upon the death of the testator. (Underwood *vs.* Curtis, 127 N. Y., 523, 534.)

This doctrine to its full extent has been recognized and enforced by this court in Craig *vs.* Leslie, 3 Wheat., 563–577, and in Peter *vs.* Beverly, 10 Pet., 532–563.

Hence when Mrs. Elkin made this will and her husband assented to it, they, the owners of the entire title, legal and equitable, gave to the real estate the character of personal property, and when, after her death, he, in anticipation of the sale, received from the executor an advance on account of his share of that personal property, her heirs cannot be heard to say that the will must be judged as a will of real estate.

3. *By the statute law in force in the District of Columbia when the will in controversy was made, Mrs. Elkin had power to make the devise in question.*

The original English statute of wills (32 Hen. 8, ch. 1) first gave to the owner of a freehold interest in real estate the power to dispose of it by will. As amended by 34 and 35 Hen. 8, ch. 5, married women were expressly excluded from the operation of the former act (1 Jarman on Wills, 33; 3 Wash. on Real Prop., Book III, ch. VI, p. 680). These acts never have been in force in the District of Columbia. When the District was created by the act of 27 February, 1801, it was provided that the laws of the State of Maryland as they existed on that day should continue in force within the District (R. S. D. C., sec. 92; 2 Stat., 103, 104). On the 27th of February, 1801, the laws and regulations concerning last wills and testaments and cognate subjects in the State of Maryland were embraced in the Maryland act of 1798, chapter 101 (Kilty's Laws). By subchapter 1, sections 1, 2, and 3, of that act it was provided as follows:

"1. All lands, tenements and hereditaments, which might pass by deed, or which would, in case of the proprietor's dying intestate, descend to, or devolve on, his or her heirs or other representatives, except estates tail, shall be subject to be disposed of, transferred and passed, by his or her last will, testament or codicil, under the following restrictions:

"2. No will, testament, or codicil, shall be effectual to create any interest or perpetuity, or make any limitation, or appoint any uses, not now permitted by the constitution or laws of the State.

"3. No will, testament or codicil, shall be good and effectual for any purpose whatever, unless the person making the same be, at the time of executing or acknowledging it as hereafter directed, of sound and disposing mind, and capable of executing a valid deed or contract. No will, testament or codicil, shall be good and effectual to pass any interest, or estate in any land, tenement, or incorporeal hereditament, unless the person making the same, if a male, be of the full age of twenty-one years, and if a female, of the full age of eighteen years."

This act of 1798 is entitled "An act for amending and reducing into system the laws and regulations concerning last wills and testaments, the duties of executors, administrators, and guardians, and the rights of orphans and other representatives of deceased persons." Its opening sentence is as follows:

"Whereas the laws and regulations relative to the estates of deceased persons, comprehending a great variety of subjects, and interesting to citizens of every description, not only are become complicated and difficult to be understood, but are found by experience to be greatly inadequate to the purposes for which they were framed;

"II. *Be it enacted, by the General Assembly of Maryland,* That every provision, rule or regulation, contained in any act of assembly heretofore passed, *or in any English statute introduced, used or practiced under, in this State,* which is inconsistent with, or repugnant to, anything contained in this act, be and it is hereby repealed and rendered utterly void and of no effect."

In "Kilty's Report of the English Statutes in Force or Applicable in Maryland" he includes the two English statutes above referred to in his list of statutes "found applicable, but not proper to be incorporated." On page 163 he says the 14th section of the act of 34 Hen. 8, ch. 5, declares that wills made by any woman covert or person within the age of twenty-one years, idiot, or person of non-sane memory, shall not be taken to be good or effectual in law, and he adds, as a conclusion of his own, that in the Maryland testamentary law women covert are not by name incapacitated, but that they must be considered as excluded, because they are not capable of making a valid deed or contract.

In the preface to Alexander's British Statutes in Force in Maryland (1870) the history of Kilty's work above referred to is given. It will be seen that while Kilty's collection and classification of the British statutes was made under authority of an act of the Maryland legislature, his report was never formally approved and adopted. Alexander gives

in his work all the British statutes which Kilty had found applicable and proper to be incorporated in the laws of Maryland, and in addition several other statutes which were subsequently declared by the court of appeals of Maryland to be in force in that State, but he does not insert the English statute of wills or make any reference to it.

The earliest published statutes of Maryland are collected in Bacon's Laws of Maryland, published by Jonas Green in 1765. This volume begins with the statutes passed at the General Assembly begun on the 25th of January, 1637, and in the note Bacon describes this assembly as "the first of which any record appears in this province," and it includes all the statutes passed up to and including the 26th of November, 1763.

The next published statutes are found in Hanson's volume of statutes, published in 1787 under the act of 1784, which provided that Mr. Frederick Green, printer to the State, be directed to collect and print all the acts of assembly then in force passed since the 26th of November, 1763, to the end of that session of the assembly, under the direction of Alexander C. Hanson and Samuel Chase, and that volume comprehends all the statutes passed up to that date.

Kilty's Statutes extend to the 3d of January, 1800.

A careful examination of all of these Maryland statutes reveals the fact that there never was any statute of the province or State of Maryland authorizing lands to be passed by will or defining the mode of execution of wills of land or the qualifications of testators until the act of Assembly of Maryland of 1798, chapter 101. (Volume 2, Kilty's Laws of Maryland.)

The right to make wills of lands is recognized as early as 1715, when, by the second section of the act of that date (chapter 39), it is provided that the commissary general shall—

"take the probate or cause to be proved any last will or testament within this province, although the same cou-

cerns titles of land; any law, statute, usage or custom to the contrary notwithstanding."

The right to devise by will is again recognized in the twelfth section of the act of 1777, chapter 8, in which it is provided that if a testator—

"shall have devised any lands by a will in writing, then such will shall be proved in the orphans' court of that county wherein such lands shall lie."

The right to make a will devising lands thus recognized could only refer to the power given by 32 Hen. VIII, ch. 1, explained by 34 Hen. VIII, ch. 5, and as to these statutes Kilty, in his report made in 1810, twelve years after the act of assembly of 1798, ch. 101, above referred to, says (Kilty's Report of Statutes, 163):

"It is not thought necessary to attempt a more particular description of these statutes, because, although they undoubtedly extended to the province and continued in force in the State before the testamentary law, it is considered that (supposing them not repealed thereby) it is not necessary that they should be incorporated, etc., in addition to the comprehensive provisions that are made in that law."

When Chancellor Hanson drafted the act of 1798, ch. 101, he must have had before him the English statutes of wills of Henry VIII, and the assembly must be presumed to have had in mind the provisions of those acts when they adopted the language of his draft of the statute of 1798, ch. 101, declaring that—

"*every provision* * * * in *any* English statute, introduced, used or *practiced under* in this State, which is inconsistent with, or repugnant to, *anything* contained in this act, be and it is hereby repealed and rendered utterly void and of no effect."

This statute then proceeds, and for the first time in the history of legislation in Maryland expressly authorizes devises of

land by will, prescribes the mode of execution, what may be devised, the estates which may be created, the personal qualifications of testators, and, in short, covers the entire subject of testamentary disposition of lands.

The particular language employed in the first three sections of this act is worthy of special consideration. It confers in the amplest terms the power of disposition of lands by will without restrictions as to persons or estates.

The first section is confined to a description of what may be devised and by what form of testamentary paper, and seems to have been framed with more especial reference to unrestricted comprehensiveness than anything else.

Thus by the express terms of the first clause "all lands, tenements, and hereditaments which might pass by deed" is thus generally described and made devisable by will.

If, however, for any reason an estate was not subject to be conveyed by deed, the power to devise was yet conferred by the next clause, still more comprehensive in its language and disjunctively used in this section, by the words:

"*or* which would, in case of the proprietor's dying intestate, descend to, or devolve on his or her heirs or other representatives."

In describing the manner in which testamentary disposition of land may be made, the same liberal purpose of the legislature is shown by the terms employed in the next clause, namely:

"shall be subject to be disposed of, transferred and passed by his or her last will, testament or codicil."

Thus by this section any interest in land over which the proprietor had the power of conveyance or which could pass by descent might be disposed of by will by such proprietor without exception or reservation of any kind by a "last will, testament or codicil."

The second section is confined to a limitation of the estates

which may be created, and prohibits any perpetuity or other estate not then permitted by the constitution and laws.

The third section is confined to the qualifications of devisors, and imposes but two limitations (*a*) testamentary capacity—that the party shall be of sound and disposing mind and capable of executing a valid deed or contract—and (*b*) age—that if a male he shall be twenty-one, and if a female, eighteen.

It was suggested by Chancellor Kilty that the capacity to execute a valid deed or contract excludes a married woman, but this suggestion is readily answered.

In the first place, it is most obvious from the context and association that this language is used as descriptive of the *mental* capacity, not the *legal* capacity, of the devisor.

In the next place, the only persons who could be said to be incompetent to execute a valid deed or contract would be infants, persons of unsound mind, and *femes covert*. Age and mental soundness are in terms provided for. It is unreasonable to suppose that coverture alone was intended by the vague phrase "capable of making a valid deed or contract." And if the provision be construed to relate to coverture, the careful and separate designation in the first section authorizing devises of lands which could pass by deed *or* by descent would become meaningless.

The conclusion is therefore inevitable that it was the clear purpose of this act to ignore and repeal the exception of *femes covert* in the statute of Henry VIII.

In several States it has been held that where several classes of persons are excepted from a general grant of the right to dispose of property by will, and married women are not included in the exceptions, they become vested with the power to make a will, notwithstanding the existence of a prior statute expressly excluding them. Leading cases on this subject are Allen *vs.* Little, 5 Ohio, 65; Noble *vs.* Enos, 19 Ind., 72, and Bennett *vs.* Hutchinson, 11 Kan., 399, per Brewer, J.

In the case above cited of Fisher, ex'r, *vs.* Kimball, 17 Vt., 323–328, in which it was held that the husband's consent made the will of a married woman valid, Judge Redfield states at the conclusion of the opinion:

"As our statute expressly excepts from the right of making wills persons not of full age and sound mind, it is supposed by many that it must include married women. Judge Reeves seems to take this view of similar statutes, and if it were necessary I think very good reasons might be urged in favor of that view."

The subject of the power of married women to make wills is discussed with great learning and ability by Judge Reeves in his work on "Domestic Relations," in chapters XI and XII. He shows the error of the doctrine sometimes laid down that a married woman is absolutely disqualified from making a will by reason of her coverture in the same way that an idiot is disqualified from want of mental capacity. He reaches the following conclusions:

1. That from the time of the Norman conquest until the statute of 32 Hen. 8, ch. 1, ~~real estate~~ interest in real estate a freehold in England could not be devised at all.

2. That what little can be ascertained as to the Saxon law on this subject before the advent of the Normans indicates that a married woman could devise both real and personal property.

3. That after the statute of 34 Hen. 8, ch. 5, was enacted a married woman could not devise real estate because she was excepted from its provisions.

4. That at common law the husband was the owner of the wife's chattels, and she could not devise them simply because she did not own them, not because of any inherent incapacity to make a will.

5. That the husband could always waive his marital rights and allow the wife to bequeath her personal property, the bequest in such case operating as a gift from him.

6. That this and numerous other instances in which the will of a married woman is sustained show that there was no disability resulting from coverture merely.

7. That the English statute of wills is not in force in this country, the subject here being universally regulated by local statutes.

8. That as the Connecticut statute of wills did not in terms exclude married women, they had the right to make a will.

In the case of Cutter *vs.* Butler, 25 N. H., 343–353, the exceptions to the rule that the will of a married woman is void are collected and shown to be as follows:

1. When she acts in *autre droit*, as executrix.

2. When the husband is banished from the realm.

3. When she holds personal property in trust, subject to her appointment.

4. Under an antenuptial agreement with the husband as to a will of personalty.

5. As to chattels real, by the assent of the husband.

6. As to choses in action, by the consent of the husband.

7. As to chattels generally when the husband waives the right to them.

8. In any will of personal property the husband, though not having consented beforehand, may acquiesce, and the will is good.

As to the act of Congress commonly called the married woman's act (which is quoted in full on page 3 of this brief), it is obvious that the purpose of that statute was to give to married women certain rights which they did not have before, and that if the right of making a will in certain cases existed before that statute, that statute did not take it away. It is submitted therefore, upon this branch of the case, first, that coverture does not of itself disqualify a woman from making a will; second, that the English statute of wills, so far as it excepts married women, never was in force in this District; third, that the Maryland act of 1798, in express terms, gave to all women over eighteen years of age, married or unmarried, the right to make a will of real estate; and, fourth, that no subsequent legislation has taken away that right in this District.

Our next contention is that even if, under the statutory law of the District of Columbia prior to the passage of the married woman's act, Mrs. Elkin was not empowered to make the will in question, that right was conferred upon her by that statute as originally enacted. It gave the right to every married woman to devise and bequeath her property or any interest therein, except such as she acquired "by gift or conveyance from her husband." In the case of Sykes *vs.* Chadwick, 18 Wall., 141, this court held that by the words "gift or conveyance from her husband," in the act of 1869, is meant *voluntary* gift or conveyance, and that where a husband conveys property to his wife for a valuable consideration the exception does not apply, and the wife, by virtue of the statute, may devise the property so transferred to her "in the same manner and with the like effect as if she were unmarried."

The evidence in this case shows very clearly that Elkin was a worthless fellow, and that his wife was the mainstay of their little family. His conduct after the death of his wife, which will be referred to below, sufficiently indicates this. He had been a clerk in one of the departments, a

hotel watchman, proprietor of a little grocery store, and a vendor of peanuts and bananas (22). The deed from Elkin to Calvert and the deed from Calvert to Mrs. Elkin each recites a consideration of five dollars, and that was probably all the money that passed at the time (13, 12, 21); but Calvert testifies that at the time these conveyances were made Elkin informed him that his wife had helped him to pay for the property or given what money she had; that Mrs. Elkin had some money which her father-in-law had sent her at different times, and had accumulated some little money by doing fancy work; that Mrs. Elkin had helped her husband to pay for the house which they built on the land after they bought it, and that Mrs. Elkin had spoken to him (Calvert) several times about the matter before the property was actually deeded to her (19, 20). It appeared also that when Mrs. Elkin would receive letters from her father-in-law containing money her husband would open them and take the money out, and that when she had any money she had to hide it in her stocking (20).

Mary J. Lowry, who was the sister of Mrs. Elkin and Mr. Calvert, testified that Mrs. Elkin's father-in-law sent his daughter-in-law money at different times, the witness having seen several of the checks; that Mrs. Elkin kept the money in her stocking; that Mrs. Elkin used also to earn money by sewing; that Mrs. Elkin gave her husband money to help pay the notes he gave for building the house on the land, and that Elkin would take from his wife money which was sent to her for the benefit of her children (22, 23).

The testimony of these witnesses for the defendant was corroborated by Mrs. Ellis, a witness for the plaintiff, who testified that Mrs. Elkin on several occasions had given her money to keep which Mrs. Elkin had received from her father-in-law, Solomon Elkin (27).

The Court of Appeals considers the evidence here recited as requiring little attention from it. That court assumes that the amounts which Elkin received from his wife were

small and were given to him "to aid in paying for the building of the small house that was erected on the land" (30). We respectfully submit that this evidence was sufficient to entitle the defendant to have the jury say whether upon the whole case they were satisfied that the conveyance of this property through Calvert to Mrs. Elkin was without consideration. In the nature of things it was impossible, after such a lapse of time and after the death of the two principal parties to the transaction, to show just what amount of money Mr. Elkin had received from his wife. But the payments that were proved and the testimony showing that Elkin was a worthless, improvident man and his wife a frugal, careful housewife, earning money by her own work and receiving money from her father-in-law, with Calvert's testimony as to what took place when the deeds were made, to say the least, left it a question whether or not they were made because Mrs. Elkin's money had bought the land or had materially contributed to its purchase and to the building of the house. It was not necessary to show that Mrs. Elkin paid full value for the property. If there was any valuable consideration moving from her, then, under the decision of this court in Sykes *vs.* Chadwick, she held the property as her statutory separate estate and could convey it by deed or will, as she pleased.

It will probably be contended that the money which Mrs. Elkin earned, as well as that which she received from her father-in-law, became the property of her husband, and that his receiving what already belonged to him would not furnish a good consideration for the transfer of this land to his wife; but we have already shown that the law does not compel the husband to take the wife's chattels. He has the right to take them, but that right he may waive.

Moreover, the conveyances by which the title to the property was vested in Mrs. Elkin were not made until April, 1872, three years after the married women's act had become the law of the District, and under that statute all the money

which she received from her father-in-law became her separate property. This money of itself would have furnished a valuable consideration for the transfer of the title to the real estate to her; and when her husband received from her the money so sent to her by his father the presumption arises, even without any aid from the testimony, that he received it as her trustee and under an obligation to account to her for it (Stickney *vs.* Stickney, 131 U. S., 238). As to her earnings, it is true that under the decision of this court in Seitz *vs.* Mitchell, 94 U. S., 580, her husband would have had the right to claim them, but it is equally clear that that right he could waive. The court in that case, referring to the wife's earnings, say:

"She can have them only by the gift of her husband, and such gift is not protected against his creditors."

But having given them to her, they became a valuable consideration for a conveyance from him to her, and his entire conduct, as evidenced by the testimony above referred to and by his subsequent affirmance of and acquiescence in the will and the sale made under it, shows that what money he received from his wife he received not under any claim of right, but in such a manner as to impose upon him the same obligation that would have been imposed upon anybody else who had borrowed it.

But whatever may have been the proper construction of the married women's act of the District in this respect as originally enacted in 1869, the case becomes perfectly clear when we consider the change made in the wording of that statute when it was incorporated in the Revised Statutes of the District of Columbia in 1874. From a comparison of the original act with the corresponding sections of the Revised Statutes (see pages 3 and 4 of this brief) it will be seen that the first section of the original law, which contained a single sentence, was thrown in the revision into two separate and distinct sections—727 and 728. And

while by the original law the power of a married woman to devise property was limited to property which she had acquired otherwise than by gift or conveyance from her husband, in the revision she was given the power without qualification to devise "her property or any interest therein."

Unless when read by itself there is some ambiguity in section 728 of the revision, the original statute cannot be taken into consideration in construing it, and we submit, with all deference to the court below, that there is no ambiguity in the language of this paragraph. Both in its legal and in its common acceptation the word *property* is broad enough to include everything that one person can own and transfer to another. (19 Am. and Eng. Enc., 283–285; Black's Law Dict. and Anderson's Dict. of Law—word property.)

The deed from Calvert to Mrs. Elkin conveys the land described in it to her in fee-simple. It is conveyed to her "and her heirs and assigns forever." It is to be held unto her, "her heirs and assigns, to her and their sole use, benefit and behoof forever" (9). This certainly made the land conveyed "her property."

Much light is thrown upon this question by an act of Congress approved June 1, 1896 (29 Stat., 193), entitled "An act to amend the laws of the District of Columbia as to married women, to make parents the natural guardians of their minor children, and for other purposes." The sections of that act which are pertinent here are as follows:

"That the property, real and personal, which any woman in the District of Columbia may own at the time of her marriage, and the rents, issues, profits, or proceeds thereof, and real, personal, or mixed property which shall come to her by descent, devise, purchase, or bequest, or the gift of any person, shall be and remain her sole and separate property, notwithstanding her marriage, and shall not be subject to the disposal of her husband or liable for his debts, except that such property as shall come to her by gift of

her husband shall be subject to, and be liable for, the debts of the husband existing at the time of the gift.

"SEC. 2. That a married woman, while the marriage relation subsists, may bargain, sell, and convey her real and personal property, and enter into any contract in reference to the same in the same manner, to the same extent, and with like effect as a married man may in relation to his real and personal property, and she may, by a promise in writing, expressly make her separate estate liable for necessaries purchased by her or furnished at her request for the family.

* * * * * * *

"SEC. 11. That sections seven hundred and twenty-seven, seven hundred and twenty-nine, and seven hundred and thirty of the Revised Statutes of the United States for the District of Columbia, be and the same are hereby repealed."

The first section of the above act changes the law by making a married woman's property her separate estate, whether it comes from her husband or not. The second section authorizes a married woman to "bargain, sell, and convey" her property, omitting the words "devise and bequeath," in the earlier act. But by section 11 of the later act sections 727, 729, and 730 of the Revised Statutes of the District are repealed, leaving section 728 in full force and effect. Obviously Congress understood section 728 to give to a married woman the power to devise and bequeath her property without limitation, and therefore allowed it to stand. But if that section has the restricted meaning which was given to it by the Court of Appeals in this case, the legislature has failed in its obvious intent. By virtue of the later act a married woman while living would have the same rights as an unmarried woman in her property, from whatever source derived, but she could not dispose of it by will if it came from her husband.

Of course we know that it is not in the power of Congress by a later statute to construe an earlier one so as to affect rights that have accrued in the meantime; but the fact that

those who prepared, evidently with great care, this important act of 1896, understood section 728 to give to a married woman the absolute right of disposing by will of all her property, and so did not change it, is very persuasive as to the natural import of the words used in that section. When the appellant purchased the land in controversy in 1879 the lawyer who examined the title for her (25) would naturally have looked at section 728 if he was not already familiar with it, and he would have found nothing in it to suggest to him a doubt as to its meaning that would impose upon him the duty of looking back to the original statutes. He had a right, therefore, to assume that it meant what it said; otherwise the Revised Statutes would be worse than useless. They might mislead, but could never aid, the searcher for the law.

And there was a good reason for this change in verbiage when section 728 was drawn over and above the general tendency to the emancipation of married women from the restraints as to their property rights imposed by the common law. We have seen that under the Maryland act of 1798 married women had the right to devise their real estate. It had, no doubt, been otherwise construed in some extra-judicial opinions. The language of the original act of 1869 gave color to this construction and might seem to take away the right when property came to the wife from her husband.

But whether the reason was good or bad, the change was made, and, like hundreds of other changes in the revision, must be given its full effect.

"The primary and general rule of statutory construction is that the intent of the law-maker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional and only arise when there are cogent reasons for believing that the letter does not fully and accu-

rately disclose the intent. No mere omission, no mere failure to provide for contingencies which it may seem wise to have specially provided for, justify any judicial addition to the language of the statute. In the case at bar the omission to make specific provision for the time of payment does not offend the moral sense (*Holy Trinity Church vs. United States*, 143 U. S., 457). It involves no injustice, oppression, or absurdity (*United States vs. Kirby*, 7 Wall., 482; *McKee vs. United States*, 164 U. S., 287). There is no overwhelming necessity for applying in the one clause the same limitation of time which is provided in the other."

U. S. *vs.* Goldenburg, 168 U. S., 102, 103.

"It is true that the language of the section indicates the opinion that jurisdiction existed in the circuit courts rather than an intention to give it, and a mistaken opinion of the legislature concerning the law does not make law; but if this mistake is manifested in words competent to make the law in future, we know of no principle which can deny them this effect. The legislature may pass a declaratory act, which, though inoperative on the past, may act in future. This law expresses the sense of the legislature on the existing law as plainly as a declaratory act, and expresses it in terms capable of conferring the jurisdiction."

Postmaster General *vs.* Early, 12 Wh., 148.

A case strikingly illustrating the position for which we are now contending is United States *vs.* Bowen, 100 U. S., 508–513. As the law stood prior to the revision, all pensioners were required to give them up on entering the Soldiers' Home at Washington; but in the revision, by the interpolation of the words "all such," the law was changed so as to provide that only those pensioners should be required to surrender their pensions on entering the home *who had not contributed to it.* It was held in that case that the language under consideration as it stood in the revision was plain, and that the original act therefore could not be referred to in construing it; and the court adds that there was a good reason for the change, since those who had by deductions from their pay or otherwise contributed to the

building of the home were entitled to go there when old and disabled without being required to give up their pensions.

In that case a general provision in the original act had been limited in its operation to a certain class by the insertion of the word "such." In this case a particular provision has been made general by omitting the words "the same." The language of the revision involved here is certainly as plain as that which was under consideration in United States *vs.* Bowen, and the reason for the change in this case is as obvious as it was in that.

United States *vs.* Bowen was approved and followed in Cambria Iron Company *vs.* Ashburn, 118 U. S., 54–57. In that case the court had under consideration section 639 of the Revised Statutes, which was taken from, but changed, the act of March 2, 1867 (14 Stat., 558). Mr. Chief Justice Waite, in delivering the opinion of the court in that case, said:

"There is nothing of doubtful meaning in this section. It is divided into three subdivisions, all relating to the removal of suits, but each providing for a separate class. * * * *Each subdivision is complete in itself and in no way depends upon any other.* Each describes the particular class of suits to which it relates and without reference to the others."

In Deffeback *vs.* Hawke, 115 U. S., 392–402, this court said:

"No reference, therefore, can be had to the original statutes to control the construction of any section of the Revised Statutes when its meaning is plain, although in the original statutes it may have had a larger or more limited application than that given to it in the revision."

Finally, in the important case of Bate Refrigerating Company *vs.* Sulzberger, 157 U. S., 1–39, this court, in referring to the argument pressed upon it in that case that the re-

vision should be held to mean what the prior law meant, "unless a purpose to change and alter is manifested by clear, unambiguous language," said:

"The circumstances under which the courts may look at prior laws for which a revision has been substituted are stated in United States *vs.* Bowen, 100 U. S., 508–513. * * * For the reasons already stated, the principle announced in the cases just cited cannot avail the plaintiff if the existing statute is interpreted to mean what its words import according to their natural signification."

Again in the same case, at page 45, the court, in enforcing its conclusion that changes in the original law are presumed not to be mistakes, says:

"This presumption is strengthened by an examination of the act approved February 18, 1875 (18 Stat., 316). * * * That act upon its face shows that the entire revision of 1874 after it took effect was carefully re-examined for the purpose of ascertaining whether there were errors or omissions in the work of revision. Now, it is inconceivable that the difference * * * could have escaped the attention of Congress. * * * The act of 1875, for the purpose of correcting errors and omissions, amended or repealed nearly seventy sections of the Revised Statutes. Still further, as an examination of the statutes will show, since the Revised Statutes went into operation nearly eight hundred sections other than those referred to in the act of 1875 have been amended or repealed; but no amendment has ever been made of section 4887."

This argument applies with equal force to the Revised Statutes relating to the District of Columbia. An examination of Richardson's Supplement to the Revised Statutes 1874–1891, pages XVII, XVIII, will show that prior to November, 1891, about one hundred amendments had been made in them. These changes involved more than 200 of the 1,296 sections in that revision; yet not only has section 728 not been amended, but, as we have seen, it has recently been reaffirmed by repealing the other sections taken from the

married women's act of 1869 and allowing it to stand—allowing it to stand in such a way as to show that it was understood to give to a married woman the right to dispose by deed or will of all her property, however acquired.

The last section of the Revised Statutes of the District, section 1295, provides that all prior acts of Congress relating to the District, "any portion of which is embraced in the foregoing revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof."

In the opinion of the Court of Appeals in this case rendered on the first appeal reference is made to the case of Kaiser *vs.* Stickney, 131 U. S., Appendix CLXXXVII, as sustaining the conclusion reached by that court against the validity of Mrs. Elkin's will. There is no statement of the facts in that case accompanying the opinion in 131 U. S. The case, as decided in the supreme court of the District of Columbia, is reported in 3 MacArthur, 118. It there appears that the instrument, the validity of which was in question in that case, was a deed which was executed and delivered in September, 1867, before the passage of the married women's act of the District. Neither in the report of the case in 3 MacArthur nor in the report of the case in 131 U. S. is any statement made as to the briefs of counsel, nor even as to the points upon which the respective counsel relied; but upon examination of the briefs on file in this court we find that when the case was argued here on behalf of the wife, her counsel, Michael L. Woods and Belva A. Lockwood, themselves contended that the wife did not take under the deed to her either an equitable or a statutory separate estate. Their whole argument was based upon the proposition that the land involved in the case was a part of the wife's general property. The opposing counsel, Mr. Enoch Totten, in his brief did not controvert this view of the matter. Consequently the decision of

this court was put upon a state of facts admitted to exist by the counsel in that case. The whole question was disposed of by Mr. Chief Justice Waite in a single sentence. We submit that, even if the facts in that case were like the facts in the case at bar, the rights of other parties could not be affected by the concession of counsel in that case that Mrs. Kaiser did not have a separate estate. Besides, in that case the question was whether a deed was valid which had been jointly executed and acknowledged by the husband and the wife, the wife's acknowledgment being taken privily and apart from her husband, as required by the statutes of the District of Columbia governing that subject. Such a conveyance was unquestionably good, whether the property was a part of the wife's general property, an equitable separate estate, or a statutory separate estate. The only question really involved in the case was whether the wife was bound by a mortgage which was given to secure her husband's debt, and the mortgage which was in question was made in April, 1871 (3 MacArthur, 118), three years before the enactment of the Revised Statutes, and consequently before the wife had been given power generally to convey, bequeath, and devise "her property."

It is quite clear, therefore, that the Court of Appeals erred in relying upon Kaiser *vs.* Stickney as sustaining the contention that section 728 applies only to a married woman's separate estate.

If our view of this matter be correct, the jury should have been instructed to render a verdict for this defendant.

II.

THERE WAS EVIDENCE SUFFICIENT TO GO TO THE JURY TO SHOW THAT THE PLAINTIFF BY HER CONDUCT HAD PRECLUDED HERSELF FROM QUESTIONING THE VALIDITY OF THE SALE OF THIS PROPERTY BY CALVERT TO THE DEFENDANT.

The defendant purchased the land in February, 1879, when the plaintiff was something less than fifteen years of age. By the will under which Calvert made the sale the proceeds, after deducting funeral and other necessary expenses and the sum of $1,000, which was to be paid to the testatrix's husband, Abram Elkin, were to be divided in equal shares between the plaintiff and the three other children of the testatrix (10). The land sold for $1,500, so that at the most there were but a few hundred dollars which under the will were to be divided among the children. Immediately after their mother's death these children were taken charge of by their mother's sister, Mrs. Lowry, who brought them up. Calvert, as executor, helped support them. He was able to find and produce in court receipts to the amount of $598.70 for money expended for these children (19). Mrs. Lowry testified that in addition he gave her $125 in money to pay for their board (22). They therefore received more than they were entitled to under the will. After the death of Mrs. Elkin, and before the property was sold, Calvert advanced $200 to Elkin on account of the $1,000 coming to him (19), and as Elkin then went away and never returned, this left a balance in the hands of Calvert, which he seems to have considered it his duty to apply for the benefit of Elkin's children.

Mrs. Lowry testified that the plaintiff knew the place was sold and knew the money was coming from that sale; that she talked about it and told Mrs. Lowry so (22).

Calvert himself testified that the plaintiff told him that

she knew he had sold the property, and asked him what she was entitled to; that this would happen when she would come to him for clothing and necessaries; that she made her demands in pursuance of such rights, and that when she came to see him she would say that he had money belonging to her and that she wanted it (21).

The defendant testified to a visit which she received from the plaintiff in the latter part of 1885. She fixed the date as after November 22, 1885, when defendant's daughter died (25). The plaintiff became of age in the preceding March (15). The defendant's testimony as to this was as follows:

"She came out and said to me, Mrs. Hamilton, you don't know me. She said, You don't know Abbie Elkin. I answered, You have grown out of my memory. She then said, Mrs. Hamilton, did you buy this place? I answered that I did. She said, Who did you buy it from? I said, I bought it from Mr. Calvert. She said, I don't see why my uncle Fred. had any right to sell papa's property. I said to her, If I understand it right, it is not your father's. She said, Well, mamma's, then. I said, I don't know anything about it. I had a lawyer attend to it. You had better go to him, and he will tell you all about it. That was the substance of the talk. That was before she was married. It was in 1885. She said her name was Abbie Elkin. She did not say that she did not know the property had been sold. She said she was getting a big girl now, and it was time she was getting some benefit.

"Q. Did she say she had gotten any benefit before that?

"A. She did not say."

In reference to this visit, the plaintiff testified that she went to see Mrs. Hamilton because her uncle told her there was no money; that he told her this, and she went to see the defendant, and that when she went to see the defendant she went to ask her about the property (26).

All this shows very clearly that after the plaintiff became of age she, with full knowledge of the sale and that there was a question as to its validity, went to Calvert and de-

manded her share of the proceeds of the sale. This would indicate an election on her part to let the sale stand, whether she actually received anything from Calvert after she became of age or not; and this conclusion is greatly strengthened by the fact that it was not till nearly six years after this visit to the defendant that the plaintiff took any steps towards recovering the property.

But the evidence went further. It at least tended to show that after she became of age the plaintiff, with full knowledge of all the facts, actually received from Calvert a part of the proceeds of the sale. Calvert himself said that he thought he bought things for her after she became of age (21). It is true that he added that she became of age in 1881, whereas she did not in fact become of age until March, 1885. But, in the same connection, he says that she said she was of age, and that she had a right to have the things. Certainly this amounts to saying that, according to his best recollection, he bought the things for her after she was of age. But the admissions of the plaintiff herself on this subject are still stronger. She admitted that at the first trial of the case she had testified that she was probably over twenty-one when she received a pair of shoes from Calvert (27). It was proved that at the first trial she did testify positively that she received the pair of shoes after she became of age (28). She qualified this at the second trial by saying that at that time she did not know whether she was of age or not; but the plaintiff's admission at the former trial, under oath, that she received the shoes after she became of age was certainly evidence to go to the jury as to whether that was true or not. We submit, therefore, that when the Court of Appeals say that the witness testified that she could not be positive "whether she was then of the age of twenty-one years or not" (32), they overlook the evidence as to her statement at the former trial, and assume to decide a question which it was the right of the defendant to have submitted to the jury.

True, a pair of shoes may be a small matter. But it is to be remembered that the plaintiff was one of four children, among whom, assuming the sale to be valid, there were to be divided a few hundred dollars. Her share could not in any event have exceeded one hundred dollars. Slight acts or short acquiescence are enough where the contract is executed (Tyler on Infancy and Coverture, 83, 84, 85). The price of a pair of shoes might be a very considerable proportion of the whole sum due her. But whether great or small, the receipt of a pair of shoes, added to the other benefits which had been conferred upon, and demanded by, the plaintiff in respect of her share of the proceeds of the sale, presented such a state of facts as in connection with her subsequent acquiescence for six years made it not unreasonable to conclude that the plaintiff, with full knowledge, had elected to claim under the sale and not adversely to it. The evidence tending to show a ratification after becoming of age was strengthened by the testimony showing that while still a minor the plaintiff had been in part supported by Calvert, and that she knew then of the sale. (Owens *vs.* Phelps, 95 N. C., 286.)

This subject of election and ratification was considered by this court in Robb *vs.* Vos, 155 U. S., 13, 39–43. In that case an attorney, without authority from the owners, had consented to the entering of a judgment against the owners and to the sale of the land under an execution issued upon the judgment. It was held that the owners had ratified the sale by filing a petition in the case setting up a claim to the proceeds of the sale, notwithstanding the fact that they withdrew the petition before they had received anything in pursuance of it. Mr. Justice Shiras, who delivered the opinion, cites the earlier case in this court of Leather Manufacturers' Bank *vs.* Morgan, 117 U. S., 96, 114, in which it was held that a depositor whose checks had been fraudulently raised by his clerk lost his remedy against the bank merely by "delay and negligence in making known the facts to the bank, and thus

giving it an opportunity to seek restitution from the wrong-doer."

In the opinion of the Court of Appeals it is said (32) that—

"It is not pretended that the plaintiff by any act, conduct, or admission of hers caused or induced any change in the position of the defendant to her prejudice."

To this we reply in the language of this court in the above-mentioned case of Leather Manufacturers' Bank *vs.* Morgan, 117 U. S., 115:

"It is not necessary that it should be made to appear by evidence that benefit would certainly have accrued to the bank from an attempt to secure payment from the criminal. * * * As the right to seek and compel restoration and payment from the person committing the forgeries was in itself a valuable one, it is sufficient if it appears that the bank, by reason of the negligence of the depositor, was prevented from promptly and, it may be, effectively exercising it."

In this case the defendant had two possible remedies if the plaintiff had acted promptly when she became of age. She might have recovered from Calvert the money she had paid him, and she might have called to account the lawyer who had passed the title when she made the purchase. She was prevented from resorting to either of these remedies for at least six years after the plaintiff became of age, not merely by the negligence of the plaintiff, but, as the testimony tended to show, by the plaintiff actually demanding and receiving from Calvert a part of the very money which, if the sale was void, he could have been compelled to pay back to the defendant. (See Keegan *vs.* Cox, 116 Mass., 289.)

III.

UPON THE EVIDENCE THE COURT SHOULD HAVE LEFT TO THE JURY THE QUESTION WHETHER THEY WERE SATISFIED BY THE EVIDENCE THAT ABRAM ELKIN WAS DEAD WHEN THIS SUIT WAS BROUGHT IN JUNE, 1891.

We have no occasion to controvert in this case the rule that when a man has disappeared *from his usual place of abode*, and has not been heard from for seven years *by those who would be likely to be informed of his whereabouts*, a presumption of his death arises. But we do contend that, in this case, it appeared that Abram Elkin left the District of Columbia immediately after his wife's death, in May, 1876, with no intention of ever returning, and under such circumstances that it would not be likely that he would communicate with those he left behind him; and that this being so, the fact that he has not returned and that he has not been heard from here left the matter in such a condition that it was, to say the least, a question for the jury whether such a state of facts had been shown as would give rise to the presumption of death.

Calvert testified that after Mrs. Elkin was dead and her children had been taken to his father's house he saw Elkin at the house where he had lived with his wife, selling off furniture and clothing; that he was selling his children's clothing; that a few weeks afterwards when the witness went to the house he found a note there in Elkin's handwriting to this effect: "Good-bye, Fred; I am going to leave town and not come back" (20).

William Holmead testified that he saw Elkin at about the same time selling his children's clothing and other things to a lot of colored people, and that Elkin then told him that the Calverts had taken his wife and children and he was going away—going to leave the city and leave his children

with the Calverts; that Elkin's feelings towards the Calverts were very bitter (23). And Mrs. Lowry testified that at about the same time Elkin told her that he was going away, and that he did not want to stay in the city (22).

The evidence further disclosed that Elkin's parents had separated; that Elkin had sided with his mother in her dispute with his father, and that the father for this or some other reason had practically disowned him. In a note, the date of which does not appear, Solomon Elkin, the father, replying to an inquiry as to his son's whereabouts, used this remarkable expression: "If it should be the one I know he is not worth looking at" (16). Mrs. Lowry also wrote to Solomon Elkin as to his son's whereabouts and received what she termed an "insulting letter." She said the father wrote that he had cast his son off; *that he heard his son was married, and that he and his wife had gone to England.* This was four or five years after the death of Mrs. Elkin (22). Being recalled, Mrs. Lowry testified that Solomon Elkin wrote to her that he had heard that his son "*had gone to England with his wife and mother*" (23).

The plaintiff herself testified to the contents of this letter from her grandfather in about the same terms (26). She said that this correspondence took place when she was about eighteen years of age. This was about nine years before this action was brought. The evidence does not disclose that any inquiries were made for Abram Elkin after that time. The case, therefore, is one in which a man is shown to have abandoned his domicile with the intention of giving it up permanently, leaving his children under such circumstances and in such a state of feeling towards them as indicated a purpose to abandon them, and a few years afterwards he is shown to have remarried and gone to England with his wife and his mother. We submit that this is not such a case as justified the court in saying to the jury that they were bound to find that the man was dead. Rather should

they have been told that upon such evidence they would not be justified in coming to such a conclusion at all.

All the authorities seem to agree that presumption of death does not arise because a person is not heard from for seven years at a place which he has definitely abandoned as his domicile and when the circumstances indicate that he would not be likely to communicate with any person there. Thus in Watson *vs.* England, 14 Sim., 28, 29, this language is used:

"Here a girl about 16 or 17 years of age, whose father was a farmer, chose, for some reason which does not appear, to leave her father's house and to go no one knows whither. But it seems that in August, 1814, she was at Portsmouth and that she then intended to go abroad. Therefore it is but reasonable to presume that all along she had been concealing herself and that she never intended to return home.

"The mere fact of her not having been heard of since 1814 affords no inference of her death, for the circumstances of the case make it very probable that she would never be heard of again by her relations. How can I presume that she died in 1821 from a fact which is quite consistent with her being alive at that time.

"The old law relating to the presumption of death is daily becoming more and more untenable; for, owing to the facility which traveling by steam affords, a person may now be transported in a very short space of time from this country to the backwoods of America or to some other remote region where he may never be heard of again."

This subject is discussed in Lawson on Presumptive Evidence, chap. X. In his rule 53, page 237, he says:

"But the presumption of death * * * does not arise where it is improbable that the absentee, even if alive, would or could have been heard of at, or would or could have communicated with, his residence, home, or domicile."

In Miller's Estate, reported in 9 N. Y. Supp., 640, the surrogate of New York county had a case before him in which the

circumstances were very much like those in Watson *vs.* England, *supra*, and he reached the same conclusion. He said:

"The presumption does not arise where it is improbable there would have been any communication with home."

This case was affirmed by the supreme court of New York in general term mainly upon the surrogate's opinion. (See the case reported as "*In re* Taylor," 20 N. Y. Supp., 960; 66 Hun., 626.)

The general rule governing such cases as this was thus laid down by Mr. Justice Harlan, speaking for this court, in the case of Davie *vs.* Briggs, 97 U. S., 633:

"A person shown not to have been heard of for seven years by those (if any) who, if he had been alive, would naturally have heard of him, is presumed to be dead, *unless the circumstances of the case are such as to account for his not being heard of without assuming his death.*"

The rule is stated in precisely the same words in 1 Am. & Eng. Enc. (1st. ed.), 38.

In the case of Sensenderfer *vs.* Pacific Mut. Life Ins. Co., 19 Fed. Rep., 68, the jury were correctly instructed that the absence of the insured, the failure to learn of his whereabouts, the attraction of his family and his not returning to it, his business relations, and his character and standing were all to be taken into consideration as indicating his death; but that the testimony relating to his financial condition, as indicating that that might have induced him to abscond, and other evidence pointing in the same direction, should receive proper consideration at their hands, and that "whatever bearing the testimony or the circumstances of the case present, calculated to weaken or destroy the probabilities of the death of La Force, introduced by the defendant, should be carefully considered by you in connection with the testimony introduced by the plaintiff in support of the conclusion of his death."

Other instructive cases upon this subject are McMahon *vs.* McElroy, Irish L. Rep., 5 Eq., 1; *In re* Smith, 31 L. J. (new series), P. & M., 182; Dowden *vs.* Henderson, 2 Sm. & G., 360; *In re* Tobin, 15 N. Y. St. Repr., 749 (surrogate's court, N. Y. Co.); Smith *vs.* Smith, 49 Ala., 156, and Gray *vs.* McDowell, 6 Bush., 482. See also a long note upon the subject of the presumption of death from absence, in 92 Am. Dec., 707.

It will be urged, no doubt, that whether Abram Elkin was dead or not, he had abandoned his life interest in this property, and that this gave to the persons entitled in remainder the right to enter. Without conceding that there is any such rule of law, or that it is applicable to the facts in this case, it is sufficient to say that the evidence tending to show that Elkin consented to the making of this will and acquiesced in its being carried into effect, so far as he was concerned, sufficiently estopped him from asserting any claim to the possession of the land as against a purchaser under the will.

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APPENDIX.

RATHBONE *vs.* HAMILTON. } 4 App. Cas. D. C., 475–490.

Mr. Chief Justice ALVEY delivered the opinion of the court:

The first question is, from whom and how did Mrs. Lucy V. Elkin, under whom both parties to this action claim, really acquire the property, and what was the nature of the property as she held it? Did she acquire and hold it in her common-law right as a *feme covert*, or did she acquire and hold it as her separate statutory estate, as if she were not married, under section 727 of the Revised Statutes of the United States relating to the District of Columbia? This depends, of course, upon the terms of the statute, and the nature of the transaction as shown by the deeds.

The section of the statute just referred to is part of the revision of what is generally known as the Married Woman's act, of the 10th of April, 1869, 16 Stat., 45. The section as it stands in the revision is as follows:

"SEC. 627. In the District the right of any married woman to property, personal or real, belonging to her at the time of marriage or acquired during marriage in any other way than *by gift or conveyance from her husband*, shall be as absolute as if she were unmarried, and shall not be subject to the disposal of her husband nor be liable for his debts."

Now, if the wife acquired the property in question by gift or conveyance from her husband, she did not hold the same as absolutely as if she were unmarried; but she held the same as her general property, as by the common law she was authorized to acquire and hold real estate, and not as her statutory separate estate. And assuming the facts to exist as they are stated in the record, there is no escape from the conclusion that the property was acquired by gift

or conveyance from the husband, though it was through the brother of the wife of the grantor as mere medium of transfer of title. There is no attempt to show that there was any real pecuniary consideration for the deeds, and the consideration stated in them is purely of a nominal character; and all the facts attending the transaction show beyond doubt that the real purpose and design of the husband was to transfer from himself to his wife the title to the property. The passing the title through a third party in no manner changed the effect of the transfer. Though the agency of a third party was employed, it was no less in legal effect and contemplation, a gift or conveyance from the husband to the wife. Indeed, if the exception in the statute could be avoided by adopting such a facile method of conveyance to the wife as that here employed, such exception would simply be rendered nugatory, and would have better been omitted from the statute. The deed, however, to the wife was completely effective, and vested in her the legal title to the property, but she held such property as her general estate, subject to her common-law disabilities as a *feme covert*. This has been expressly held, in reference to this very statute, and in a case like the present, where the title to the wife was conveyed by the husband through the medium of a third party (Kaiser *vs.* Stickney, b'k 26, L. C. Ed. Sup. Ct. Rep., 76; S. C., 131 U. S., 87 of Appendix of previously omitted cases). And so in the case of Cammack *vs.* Carpenter, 1 App. Cases D. C. (Wash. Law Rep., vol. 22, page 302). These cases, just referred to, arose since the Married Woman's act of 1869, and were decided in reference to the provisions of that act; and it was expressly held, that the property so acquired by the wife was held by her *as her general property*, which she could only convey by uniting with her husband in a deed executed in the form required by sections 450, 451 and 452 of the Revised Statutes relating to the District of Columbia. See, also, the case of Williams *vs.* Reid, 19 D. C., 46. It is clear, therefore, that Lucy V. Elkin did not acquire and hold the property in controversy under the statute as if she were unmarried.

2d. It is contended, however, that even though it be conceded that the wife took the property as her general estate, according to the common law, yet the statute clothed her with full power of disposal of the property, either by deed or will. And it is upon the terms of the next succeeding

section, 728, of the Revised Statutes of the District, that such contention is founded. That section is in these terms:

"Any married woman may convey, devise and bequeath her property, or any interest therein, in the same manner and with like effect as if she were unmarried."

Both this and the preceding section, 727, have marginal references to the original act of 1869, ch. 23, sec. 1 (16 Stat., 45), as the source from which the text of the two sections, 727 and 728, was made. There is nothing to indicate, apart from some slight verbal changes or omissions of phraseology, that there was any design to change or extend the original provision of the act of 1869, ch. 23, sec. 1. At most, this change of phraseology could but give rise to a doubt as to the meaning of the statute.

Before this act of Congress of 1869, according to the principles of the common law in force in this District, a married woman had no power or capacity to convey the legal title of her real estate without the joinder of her husband; nor had she any power or capacity to devise her lands by will, being expressly excepted out of the statute of wills of Henry VIII. She was and is, however, competent to convey or devise by virtue of a power, and she may convey or devise her sole and separate estate in equity, except where restrained by the instrument creating the estate. Her land held by her as a *feme covert* at the common law was and is subject to the marital rights of the husband, and if he survives her, after the birth of a child, he is entitled to a life estate in the land by the courtesy.

Has this common-law principle, then, been so far radically changed by this act of Congress that the wife, though acquiring the property as at the common law, and not under the statute, may convey by deed or devise the property as if she were unmarried, and thus deprive the husband of all his marital rights? It is not seriously contended that this was the effect of the act of 1869, as originally enacted. But it is supposed that such is the effect of the change made in the phraseology of the revision.

As a rule of construction, it is laid down by the Supreme Court of the United States, that where the meaning of the Revised Statutes is plain, the court will not recur to the original statutes to see if errors were committed in the revision, but may do so to construe doubtful language em-

ployed. Cambria Iron Co. *vs.* Ashborn, 118 U. S., 54; United States *vs.* Lacher, 134 U. S., 624.

In the last case just referred to, that of U. S. *vs.* Lacher, the Chief Justice, in delivering the opinion of the court, said: "If there be any ambiguity in section 5467, inasmuch as it is a section of the Revised Statutes, which are merely a compilation of the statutes of the United States, revised, simplified, arranged and consolidated, resort may be had to the original statute from which this section was taken to ascertain what, if any, change of phraseology there is, and whether such change should be construed as changing the law. Citing United States *vs.* Bowen, 100 U. S., 508, 513; United States *vs.* Hirsh, 100 U. S., 33; Myer *vs.* Car Co., 102 U. S., 111. And it is said that this is especially so where the act authorizing the revision directs marginal references, as is the case here. 19 Stat., ch. 82, sec. 2, p. 268; Endlick on Int. Statutes, sec. 51. Accordingly we find that this section took the place of section 279 of the act of June 8, 1872."

By the first section of the original act of 1869, ch. 23, it was enacted that—

"The rights of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage, in any other way than by gift or conveyance from her husband, shall be as absolute as if she were a *feme sole*, and shall not be subject to the disposal of her husband, nor be liable for his debts; but such married woman may convey, devise or bequeath *the same*, or any interest therein, in the same manner and with like effect as if she were unmarried."

In the revision this section of the original act has been broken or divided into two short sections, 727 and 728. And the change of phraseology that has occurred does not seem to be more than was necessary and appropriate in making the new arrangement of the subjects-matter of the original section. That, as we have seen, confined the wife's separate power of disposal to the *same property* that she was authorized to acquire under the statute as separate estate. And we think the wife's power of disposal has not been enlarged or extended by the revision beyond what was given her by the original statute; and that did not apply to or embrace property acquired by gift or conveyance from her husband. The wife's power of disposal over property con-

templated by the statute is given either by deed or will; but, as we have seen, it has been held expressly, in cases like the present, that the power of disposition by deed does not exist. Kaiser *vs.* Stickney, *supra;* Cammack *vs.* Carpenter, *supra.* And if the power could not be exercised by deed, for the same reason it could not be exercised by will.

3. But it has been contended for the appellee that, independently of the power given by the statute, the wife may dispose of her real estate that she holds to her sole and separate use, either by deed or will; and that the property in this case was held by the wife to her sole and separate use.

It is doubtless true that a married woman can, in equity, dispose by deed or will of the equitable fee-simple of her real estate, and of the absolute interest in her personal estate which belong to her for her sole and separate use; since in respect to such property, she is a *feme sole.* And, in respect to such property, it is immaterial that the legal estate is not vested in trustees, as the husband and all other persons on whom the legal estate may devolve will be deemed and treated as trustees for the persons to whom the wife has given the equitable interest. This is the established doctrine in the English chancery, and it is the established doctrine of the courts of this country, to the same extent. Taylor *vs.* Meads, 4 D. I. & S., 597; Pride *vs.* Bubb, L. R., 7 Ch., 64; Cooper *vs.* MacDonald, 7 Chan. D., 288; 2 Sto. Eq. Juris., sec. 1380. If the gift of conveyance be designed to be for the wife's separate and exclusive use, that intention will be fully acted upon and carried into effect. But the question is, whether the instrument of conveyance shows plainly that to have been the intention of the parties to it; for, as said by Judge Story, "the purpose must clearly appear beyond any reasonable doubt; otherwise the husband will retain his ordinary legal and marital rights in the property." Indeed, in all cases, the words must manifest an unequivocal intent to exclude the power and marital rights of the husband. 2 Sto. Eq. Juris., secs. 1381, 1382. But here, unfortunately for the defendant, there is nothing in the deed from Calvert to Mrs. Elkin to create a sole and separate estate in her, to the exclusion of the marital rights of the husband. The only clause in the deed which could possibly be supposed to have any such effect is the ordinary habendum clause, which declares that the property was to be held "unto the said party of the second part, *her heirs*

and assigns, to and for *her and their sole use, benefit and behoof forever.*" This is but a common formula found transcribed in all the several deeds in the record; the deed from Quinter to Abram Elkin, Jr., for the property in question, appearing to furnish the precedent for all the subsequent deeds for the same property. It clearly has no such effect as that of declaring a sole and separate estate in the wife. In the case already referred to, of Kaiser *vs.* Stickney, *supra*, the deed to the wife contained the same formal habendum clause as that of the present deed, but it was not contended, nor even suggested, that it was sufficient to create a separate and exclusive estate in the wife.

If, however, the deed contained an effective clause, creating a sole and separate estate, it could not avail the defendant in this action; for in an action of ejectment a legal estate or title is as necessary when title is relied on as a defense as is such an estate or title to the right of the plaintiff to recover. A mere equitable estate could not be set up to defeat the legal estate.

4. It has been contended by the plaintiff here, the present appellant, that even assuming that Mrs. Elkin had power to dispose of the property by will, the executor named in the will had no power of sale, and that the sale made by him, therefore, was simply void. But in this we do not agree. If the right to make the devise of the estate existed, the testatrix directed her property, real and personal, to be sold, and after deducting funeral and other expenses, she directed how the proceeds of the sale should be distributed and paid out. The making of this distribution was a proper duty of the executor; and it is clear, we think, that the executor named in the will would have power to sell and convey the real estate, as he would have of the personal estate, raised by necessary implication. This would seem to be the settled construction of similar devises or directions to sell, without express power conferred. Magruder *vs.* Peter, 11 Gill and John., 217; Peter *vs.* Beverly, 10 Pet., 532; Taylor *vs.* Benham, 5 How., 233.

Inasmuch as this case must be sent back to the court below for retrial, it is proper to advert to a question that must arise in the course of the trial, and that is, the question as to the right of entry of the plaintiff. That right depends upon the question, whether the husband of Mrs. Lucy V. Elkin is dead or alive. If alive, upon the assumption

that Mrs. Elkin was without power to devise the property, he would be entitled to his life estate by the courtesy, and until the termination of that estate, the plaintiff would have no right of entry in her character of heir-at-law of her mother and, consequently, no right to maintain an action of ejectment. To maintain the action the death of the father must be shown either by positive proof or presumption.

The judgment appealed from must be reversed and a new trial awarded.

Judgment reversed, with costs to the appellant, and a new trial awarded.

No. 6.

Sup. Ct. of Worthington & Lipscomb for P. E.

Filed Nov. 15, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 6.

FRANCES REBECCA HAMILTON, PLAINTIFF IN ERROR,

vs.

GRACE ABBIE B. RATHBONE.

Supplemental Brief for Plaintiff in Error as to the Effect of the Revised Statutes on Previous Legislation.

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FRANCES REBECCA HAMILTON, PLAINTIFF IN ERROR,

vs.

GRACE ABBIE B. RATHBONE.

Supplemental Brief for Plaintiff in Error.

STATEMENT OF THE CASE.

On June 13, 1891, the defendant in error brought an action of ejectment in the supreme court of the District of Columbia against the plaintiff in error to recover an undivided third interest of a parcel of land in the District of Columbia. The courts below having held as matter of law that none of several defenses relied upon by the plaintiff in error could avail her, a final judgment was entered against her and affirmed by the Court of Appeals of the District of Columbia.

In this court printed briefs were filed and the case was fully argued, and submitted on the 15th day of April, 1898.

On the 30th day of January, 1899, the court ordered a re-argument before a full bench, and particularly directed the attention of counsel "to the question of the effect of the Revised Statutes on previous legislation."

A full statement of the case and of all the questions raised on the record will be found on pages 1 to 6 of the original brief of the plaintiff in error. As to all those questions except the one to which the court directs special attention, we do not care to add anything to that brief. The excepted question arises in this way:

In July, 1867, the land in question was conveyed to Abram Elkin, who was the husband of Lucy V. Elkin (Record, p. 17). On the 29th of April, 1872, Abram Elkin and his wife conveyed this tract to her brother, Frederick G. Calvert (13, 14), and on the same day Calvert and his wife conveyed it to Lucy V. Elkin (12). The title remained in Mrs. Elkin until her death, which occurred on May 3, 1876 (15). She left a will by which she appointed Calvert her sole executor. She directed that all her property, real and personal, should be sold, and gave her husband $1,000 out of the proceeds of the sale, directing that the residue of the proceeds of sale, after the payment of funeral and other necessary expenses, should be divided equally between her four children (17). Calvert duly qualified as executor (11). In February, 1879, he sold the land in controversy to the plaintiff in error, and on the 20th of that month he, as executor, conveyed it to her by a deed which recited that the sale had been made under the powers conferred upon him by the will (8, 9). Before making the purchase the plaintiff in error had the title to the land examined by a lawyer (25).

To sustain her action the defendant in error claimed that Mrs. Elkin held this real estate as her general property, and that, being a married woman, under the laws of the District she could not devise it. This contention was supported by the trial justice under a decision of the Court of Appeals in

the same case after a previous trial and a verdict for the plaintiff in error.

The opinion of the Court of Appeals on the first appeal was delivered by Mr. Chief Justice Alvey, and a copy of it is appended to our original brief. It will be found also in the report of the case in 4 App. Cas. D. C., 475. The case was made to turn upon the construction of section 728 of the Revised Statutes of the District of Columbia. The original statute from which that section is derived was an act of Congress approved April 10, 1869, entitled "An act regulating the rights of property of married women in the District of Columbia" (16 Stat., 45), of which the following is a copy:

"That in the District of Columbia the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were *femme sole*, and shall not be subject to the disposal of her husband, nor be liable for his debts; but such married woman may convey, devise, and bequeath *the same*, or any interest therein, in the same manner and with like effect as if she were unmarried.

"SEC. 2. *And be it further enacted*, That any married woman may contract, and sue and be sued in her own name, in all matters having relation to her sole and separate property in the same manner as if she were unmarried; but neither her husband nor his property shall be bound by any such contract nor liable for any recovery against her in any such suit, but judgment may be enforced by execution against her sole and separate estate in the same manner as if she were sole."

In the revision of the District laws in 1874 this act became sections 727 to 730, as follows:

"SEC. 727. In the District the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were unmarried, and shall not be sub-

ject to the disposal of her husband, nor be liable for his debts.

"SEC. 728. Any married woman may convey, devise and bequeath *her property*, or any interest therein, in the same manner and with like effect as if she were unmarried.

"SEC. 729. Any married woman may contract, and sue and be sued in her own name, in all matters having relation to her sole and separate property, in the same manner as if she were unmarried.

"SEC. 730. Neither the husband nor his property shall be bound by any such contract, made by a married woman, nor liable for any recovery against her in any such suit, but judgment may be enforced by execution against her sole and separate estate in the same manner as if she were unmarried."

The last section of the Revised Statutes of the District, section 1296, provides that all prior acts of Congress relating to the District, "any portion of which is embraced in the foregoing revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof."

ASSIGNMENTS OF ERROR.

The assignments of error contained on page 7 of our original brief are all still relied upon. The one with which we are now particularly concerned is the first one, which is as follows:

"The court below erred in holding that the will of Lucy V. Elkin was void as to the real estate in controversy."

ARGUMENT.

The simple question here presented is whether when a statute gives to a married woman the unqualified right to "convey, devise, and bequeath her property in the same manner and with like effect as if she were unmarried," the language is so ambiguous that it may be explained and

controlled by a prior repealed statute confining the right to property acquired otherwise than by voluntary gift or conveyance from the husband.

The Revised Statutes were intended to embrace all acts of Congress general and permanent in their nature, in force on the first day of December, 1873, "as revised and consolidated" by commissioners appointed for the purpose. The object of the revision was to have all the existing statutes brought into a single volume, so that any one wishing to find what is the written law upon any particular subject might not have to grope through the eighteen volumes of the Statutes at Large, but might find the whole of that law in a single volume, and in that volume would find grouped together the different acts of Congress relating to the same question.

This reason applied with peculiar force to statutes relating solely to the District of Columbia, for the comparatively few special acts of Congress relating to the District were covered up in a multitude of statutes applicable to the whole country. To still further remedy the inconvenience arising from this cause the statutes relating only to the District were compiled in a separate volume, known as the "Revised Statutes of the District of Columbia."

But if one who examines that volume cannot rely upon it when the language used in it is reasonably plain, the object of the revision is destroyed, and our last state will be worse than our first, for Congress in that event will have but added another statute to the mass of earlier laws, and no one will be safe without examining them all.

No stronger illustration of this can be found than the present case.

A laboring woman out of her small savings contracts to buy a lot whereon to build a home. She goes to a lawyer to have the title examined. He finds that the vendor gets title under the will of a married woman. He looks at the statute and finds that a married woman may devise her

property just as she could if she were unmarried. He passes the title, his client pays her money and takes a deed, and years afterwards it is sought by an action of ejectment to turn her out of possession because a certain old and repealed statute contained an exception as to property coming to a married woman from her husband.

If such a claim can be maintained, who will dare to rely upon the Revised Statutes in any case without going back to the original acts of Congress? And in that case of what use is the revision?

Clearly the real question is whether in the mind of one having no knowledge of the earlier statute section 728 is ambiguous; and looked at in that way it is hard to see anything ambiguous about it.

Both in its legal and in its common acceptation, the word *property* is broad enough to include everything that one person can own and transfer to another (19 Am. and Eng. Enc., 283–285; Black's Law Dict. and Anderson's Dict. of Law—word Property).

The deed from Calvert to Mrs. Elkin conveys the land described in it to her in fee-simple. It is conveyed to her "and her heirs and assigns forever." It is to be held unto her, "her heirs and assigns, to her and their sole use, benefit, and behoof forever" (9). This certainly made the land conveyed "her property."

Much light is thrown upon this question by an act of Congress approved June 1, 1896 (29 Stat., 193), entitled "An act to amend the laws of the District of Columbia as to married women, to make parents the natural guardians of their minor children, and for other purposes." The sections of that act which are pertinent here are as follows:

"That the property, real and personal, which any woman in the District of Columbia may own at the time of her marriage, and the rents, issues, profits, or proceeds thereof, and real, personal, or mixed property which shall come to her by descent, devise, purchase, or bequest, or the gift of

any person, shall be and remain her sole and separate property, notwithstanding her marriage, and shall not be subject to the disposal of her husband or liable for his debts, except that such property as shall come to her by gift of her husband shall be subject to, and be liable for, the debts of the husband existing at the time of the gift.

"SEC. 2. That a married woman, while the marriage relation subsists, may bargain, sell, and convey her real and personal property, and enter into any contract in reference to the same in the same manner, to the same extent, and with like effect as a married man may in relation to his real and personal property, and she may, by a promise in writing, expressly make her separate estate liable for necessaries purchased by her or furnished at her request for the family.

* * * * * * *

"SEC. 11. That sections seven hundred and twenty-seven, seven hundred and twenty-nine, and seven hundred and thirty of the Revised Statutes of the United States for the District of Columbia, be and the same are hereby, repealed."

The first section of the above act changes the law by making a married woman's property her separate estate, whether it comes from her husband or not. The second section authorizes a married woman to "bargain, sell, and convey" her property, omitting the words "devise and bequeath" in the earlier act. By section 11 of the later act only sections 727, 729, and 730 of the Revised Statutes of the District are repealed, leaving section 728 in full force and effect. The supposed ambiguity growing out of the contiguity of section 728 with section 727 no longer exists, because section 727 is wiped out altogether. Obviously therefore Congress understood section 728 to give to a married woman the power to devise and bequeath her property without limitation, and for that reason allowed it to stand. But if that section has the restricted meaning which was given to it by the Court of Appeals in this case the legislature has failed in its obvious intent. By virtue of the later act a married woman while living would have the

same rights as an unmarried woman in her real estate, from whatever source derived, including the right to convey it by deed, but she could not dispose of it by will if it came from her husband.

Of course we know that it is not in the power of Congress by a later statute to construe an earlier one so as to affect rights that have accrued in the meantime; but the fact that those who prepared, evidently with great care, this important act of 1896, understood section 728 to give to a married woman the absolute right of disposing by will of all her property, and so did not modify it, is very persuasive as to the natural import of the words used in that section.

There was a good reason for the change in the wording of section 728, over and above the general tendency to the emancipation of married women from the restraints as to their property rights imposed by the common law. We have shown on pages 26 to 31 of our original brief in this case that the Maryland act of 1798 on its face seemed to give to married women the right to devise their real estate. It had, no doubt, been otherwise construed in some entra-judicial opinions. The language of the original act of 1869 gave color to this construction, and might seem to take away the right when property came to the wife from her husband. It was natural that this step backward should be corrected.

But whether the reason was good or bad, the change was made, and, like hundreds of other changes in the revision, must be given its full effect.

"The primary and general rule of statutory construction is that the intent of the law-maker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere fail-

ure to provide for contingencies which it may seem wise to have specially provided for, justify any judicial addition to the language of the statute. In the case at bar the omission to make specific provision for the time of payment does not offend the moral sense (*Holy Trinity Church vs. United States*, 143 U. S., 457). It involves no injustice, oppression, or absurdity (*United States vs. Kirby*, 7 Wall., 482; *McKee vs. United States*, 164 U. S., 287). There is no overwhelming necessity for applying in the one clause the same limitation of time which is provided in the other."

U. S. *vs.* Goldenburg, 168 U. S., 102, 103.

"It is true that the language of the section indicates the opinion that jurisdiction existed in the circuit courts rather than an intention to give it, and a mistaken opinion of the legislature concerning the law does not make law; but if this mistake is manifested in words competent to make the law in future, we know of no principle which can deny them this effect. The legislature may pass a declaratory act, which, though inoperative on the past, may act in future. This law expresses the sense of the legislature on the existing law as plainly as a declaratory act, and expresses it in terms capable of conferring the jurisdiction."

Postmaster General *vs.* Early, 12 Wh., 148.

"Where a statute, as in this case, is clear and free from all ambiguity, we think the letter of it is not to be disregarded in favor of a mere presumption as to what is termed the policy of the Government, even though it may be the settled practice of the department."

St. Paul, etc., Railway Co. *vs.* Phelps, 137 U. S., 528–536.

"Where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."

Lake County *vs.* Rollins, 130 U. S., 662–670.

"Where the legislature makes a plain provision *without making any exception*, the courts can make none."

Lessee of French *vs.* Spencer, 21 How., 238.

Yturbide's Executor *vs.* U. S., 22 How., 290, 293.

"By omitting retired officers from the class entitled to longevity pay, Congress expressed its purpose not to allow them longevity pay. No other construction can be put upon the law without importing into it words which Congress has left out. * * * To give the statute this meaning would be legislation and not interpretation."

Thornley *vs.* U. S., 113 U. S., 310–315.

This court has frequently applied the rule established by the foregoing cases in the construction of the Revised Statutes.

A case strikingly illustrating the position for which we are now contending is United States *vs.* Bowen, 100 U. S., 508–513. As the law stood prior to the revision, all pensioners were required to give them up on entering the Soldiers' Home at Washington; but in the revision, by the interpolation of the words "all such," the law was changed so as to provide that only those pensioners who had not contributed to the home should be required to surrender their pensions on entering it. It was held in that case that the language under consideration as it stood in the revision was plain, and that the original act therefore could not be referred to in construing it; and the court adds that there was a good reason for the change, since those who had by deductions from their pay or otherwise contributed to the building of the home were entitled to go there when old and disabled without being required to give up their pensions.

In that case a general provision in the original act had been limited in its operation in the revision to a certain class by the insertion of the word "such." In this case a particular provision has been made general by omitting the words "the same." The language of the revision involved here is certainly as plain as that which was under consideration in United States *vs.* Bowen, and the reason for the change in this case is as obvious as it was in that.

United States *vs.* Bowen was approved and followed in

Cambria Iron Company *vs.* Ashburn, 118 U. S., 54–57. In that case the court had under consideration section 639 of the Revised Statutes, which was taken from but changed the act of March 2, 1867 (14 Stat., 558). Mr. Chief Justice Waite, in delivering the opinion of the court in that case, said:

"There is nothing of doubtful meaning in this section. It is divided into three subdivisions, all relating to the removal of suits, but each providing for a separate class. * * * *Each subdivision is complete in itself and in no way depends upon any other.* Each describes the particular class of suits to which it relates and without reference to the others."

So here section 728 is complete in itself. It does not refer to section 727, and in no way depends upon it. There is nothing in the two sections to suggest that Congress did not intend, during the joint lives of the husband and wife and until she conveyed it to somebody else, to preserve the husband's common-law rights in real estate which she had received from him, but to terminate those rights when she conveyed or devised it. The omission in section 728 of the words found in section 727—"acquired * * * in any other way than by gift or conveyance from her husband"—necessarily implies that the limitation on the wife's power which they import was not to apply in cases arising under section 728.

In Deffeback *vs.* Hawke, 115 U. S., 392–402, this court said:

"No reference, therefore, can be had to the original statutes to control the construction of any section of the Revised Statutes when its meaning is plain, although in the original statutes it may have had a larger or more limited application than that given to it in the revision."

Finally, in the important case of Bate Refrigerating Company *vs.* Sulzberger, 157 U. S., 1–39, this court, in referring

to the argument pressed upon it in that case that the revision should be held to mean what the prior law meant, "unless a purpose to change and alter is manifested by clear, unambiguous language," said:

"The circumstances under which the courts may look at prior laws for which a revision has been substituted are stated in United States *vs.* Bowen, 100 U. S., 508–513. * * * For the reasons already stated, the principle announced in the cases just cited cannot avail the plaintiff if the existing statute is interpreted to mean what its words import according to their natural signification."

Again in the same case, at page 45, the court, in enforcing its conclusion that changes in the original law are presumed not to be mistakes, says:

"This presumption is strengthened by an examination of the act approved February 18, 1875 (18 Stat., 316). * * * That act upon its face shows that the entire revision of 1874 after it took effect was carefully re-examined for the purpose of ascertaining whether there were errors or omissions in the work of revision. Now, it is inconceivable that the difference * * * could have escaped the attention of Congress. * * * The act of 1875, for the purpose of correcting errors and omissions, amended or repealed nearly seventy sections of the Revised Statutes. Still further, as an examination of the statutes will show, since the Revised Statutes went into operation nearly eight hundred sections other than those referred to in the act of 1875 have been amended or repealed; but no amendment has ever been made of section 4887."

This argument applies with equal force to the Revised Statutes relating to the District of Columbia. An examination of Richardson's Supplement to the Revised Statutes 1874–1891, pages XVII, XVIII, will show that prior to November, 1891, about one hundred amendments had been made in that portion of the Revised Statutes which relates to the District. These changes involved more than 200 of the 1,296 sections in that revision; yet not only has section 728

not been amended, but, as we have seen, it has recently been reaffirmed by repealing the other sections taken from the married women's act of 1869 and allowing it to stand—allowing it to stand in such a way as to show that it was understood to give to a married woman the right to dispose by will of all her property, however acquired.

In Chief Justice Alvey's opinion in this case some stress is laid upon the language used by the Chief Justice of this court in the case of United States *vs.* Lacher, 134 U. S., 624, in which, after citing several of the cases in this court in which it has been held that where there is any ambiguity in the Revised Statutes the original statutes may be referred to to ascertain what, if any, change of phraseology there is and whether such change should be construed as changing the law, it is added that " this is especially so where the act authorizing the revision directs marginal references, as is the case here (19 St., ch. 82, sec. 2, p. 268; Endlich on Int. Stats., sec. 51)."

The act of Congress in the 19th Statutes at Large here referred to was enacted March 2, 1877 (19 Stat., 268). It provides for a new edition of the first volume of the Revised Statutes.

That act was amended March 9, 1878, by changing section 4 so that the printed volume which the act provided for should be only legal and not conclusive evidence of the laws therein contained, and by adding to section 4 a clause providing that the volume containing the second edition of the Revised Statutes " shall not preclude a reference, to nor control in case of any discrepancy, the effect of any original act as passed by Congress since the first day of December, eighteen hundred and seventy-three " (20 Stat., 27).

The will involved in this case was made April 22, 1876 (10), and took effect on the death of the testatrix, prior to the 8th day of June, 1876, when her executor took out his letters (11). It is manifest, therefore, that an act of Congress

passed in 1877 could not affect the validity of this instrument.

There has never been a second edition of the Revised Statutes relating to the District of Columbia. The preparation and publication of that volume were authorized by the acts of June 27, 1866 (14 Stat., 74), providing for the general revision of the statutes, and by the act of June 20, 1874 (18 Stat., 113). The act of June 27, 1866, provides that the commissioners "shall arrange the same * * * with side notes so drawn as to point to the contents of the context, and with references to the original text from which each section is compiled, and to the decisions of the Federal courts explaining or expounding the same, and also to such decisions of the State courts as they may deem expedient." The same act further provides by section 3 that when the commissioners have completed the revision they shall submit a copy thereof in print to Congress, in order "*that the statutes so revised and consolidated may be re-enacted if Congress shall so determine; and at the same time they shall also suggest to Congress such contradictions, omissions and imperfections as may appear in the original text, with the mode in which they have reconciled, supplied and amended the same*"

Section 2 of the act of June 20, 1874 (18 Stat., 113), charges the Secretary of State with the duty of causing the revision to be prepared for printing and publication, and authorizes him to complete the references to the decisions of the courts of the United States "and such decisions of State courts as he may deem expedient."

The same section makes the proposed publication legal evidence of the laws and treaties therein contained. There is as to the original revision, neither in this act nor any subsequent statute, any such provision as the above-quoted one in section 4 of the act of March 2, 1877, relating to the second edition of the Revised Statutes. It, is, therefore, quite apparent that, while Congress intended that as to the second edition any discrepancies between it and acts of Congress

passed after December 1, 1873—the date of the original revision—should be settled by reference to the original act, yet as to the original revision it was to stand, regardless of such discrepancies.

It was pursuant to section 3 of this same act of June 20, 1874, that the Revised Statutes were divided into volumes, the first containing the Revised Statutes of the United States and the second the Revised Statutes relating to the District of Columbia, post-roads, and public treaties.

It would seem from this that the commissioners who prepared the Revised Statutes relating to the District of Columbia were authorized to *amend* the statutes, and were required to submit their work to Congress to be enacted into a law if Congress should be satisfied with the work; and since Congress did enact the work of the commissioners under the name of the Revised Statutes, that revision becomes a new law, governed by the same rules of construction that apply to any amendatory legislation.

As to marginal references, it will be seen that first the compilers and afterwards the Secretary of State were authorized to make these references include not only the original statutes from which the particular section was taken, but all decisions of the Federal courts bearing upon the section and selected references to the State decisions. It is respectfully submitted that it is not to be supposed that Congress intended to make decisions of the Federal courts and of the State courts, necessarily conflicting in many cases, a part of the revision, and that the insertion of references to original statutes and to judicial decisions, State and Federal, was for the purpose of convenience, and not with the view of affecting the construction of the section opposite which they were noted.

In the opinion of the Court of Appeals in this case rendered on the first appeal reference is made to the case of Kaiser *vs.* Stickney, 131 U. S., Appendix CLXXXVII, as sustaining the conclusion reached by that court against the

validity of Mrs. Elkin's will. There is no statement of the facts in that case accompanying the opinion in 131 U. S. The case, as decided in the supreme court of the District of Columbia, is reported in 3 MacArthur, 118. It there appears that the instrument, the validity of which was in question, was a deed which was executed and delivered in September, 1867, before the passage of the married women's act of the District. Neither in the report of the case in 3 MacArthur nor in the report of the case in 131 U. S. is any statement made as to the briefs of counsel, nor even as to the points upon which the respective counsel relied; but upon examination of the briefs on file in this court we find that when the case was argued here on behalf of the wife, her counsel, Michael L. Woods and Belva A. Lockwood, themselves contended that the wife did not take under the deed to her either an equitable or a statutory separate estate. Their whole argument was based upon the proposition that the land involved in the case was a part of the wife's general property. The opposing counsel, Mr. Enoch Totten, in his brief did not controvert this view of the matter. Consequently the decision of this court was put upon a state of facts admitted to exist by the counsel in that case. The whole question was disposed of by Mr. Chief Justice Waite in a single sentence. We submit that, even if the facts in that case were like the facts in the case at bar, the rights of other parties could not be affected by the concession of counsel in that case that Mrs. Kaiser did not have a separate estate. Besides, in that case the question was whether a deed was valid which had been jointly executed and acknowledged by the husband and the wife, the wife's acknowledgment being taken privily and apart from her husband, as required by the statutes of the District of Columbia governing that subject. Such a conveyance was unquestionably good, whether the property was a part of the wife's general property, an equitable separate estate, or a statutory separate estate. The only ques-

tion really involved in the case was whether the wife was bound by a mortgage which was given to secure her husband's debt, and the mortgage which was in question was made in April, 1871 (3 MacArthur, 118), three years before the enactment of the Revised Statutes, and consequently before the wife had been given power generally to convey, bequeath, and devise "her property."

It is quite clear, therefore, that the Court of Appeals erred in relying upon Kaiser *vs.* Stickney as sustaining the contention that section 728 applies only to a married woman's separate estate.

If our view as to the proper construction of section 728 should prevail, it is not necessary to consider any other question in this case. If it should not, then it will be necessary to dispose of the remaining questions raised on the record and discussed in our original brief.

We remind the court, however, that our contention is that the will in question is valid, even under the act of 1869 as it stood before the revision. The several grounds upon which we make this claim are fully set forth on pages 7 to 37 of our main brief in the case.

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